

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Chapter 11
W.R. Grace & Co., et al., .
Debtor(s) . Bankruptcy #01-01139 (JKF)
.....

Wilmington, DE
October 23, 2006
2:00 p.m.

TRANSCRIPT OF OMNIBUS HEARING
BEFORE THE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY JUDGE

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1 THE COURT: Good afternoon. Please be seated. This
2 is the matter of W.R. Grace, Bankruptcy #01-1139. Participants
3 by phone area, Mark Plevin, Leslie Epley, Guy Baron, Haley
4 Pendergrass, Christina Kang, Stephanie Kwong, Lisa Esayian,
5 Robert Phillips, Andrew Chan, Simon Porter, Tiffany Cobb, Peter
6 Shawn, Steven Eisman, Barbara Seniawski, Elizabeth
7 DeCristofaro, Robert Guttman, Michael Davis, Brian Kasprzak,
8 Walter, Walter Slocombe, Alex Mueller, Sal Bianca, Lori
9 Sinanyan, Barbara Harding, Theodore Freedman, Sam Blatnick,
10 Drrell Scott, Edward Westbrook, David Liebman, Jacob Cohn,
11 Sander Esserman, David Parsons, Sara Edwards, Beau Harbour,
12 William Wagner, Richard Wyron, Ritwik Chatterjee, Paul Norris,
13 Christopher Candon, David Siegel, Robert Horkovich, Daniel
14 Glosband, Marti Murray, John O'Connell, Graig Gilbert, Sara
15 Gooch, Joseph Krigsfeld, Martin Dies, I'm sorry, Terence
16 Edwards, Matther Kramer, Sean Walsh. Take entries in Court
17 please. Good afternoon.

18 MR. BERNICK: Good afternoon, David Bernick for Grace.

19 MS. BAER: Good afternoon, Your Honor, Janet Baer for
20 Grace.

21 MS. HARDING: Good afternoon, Your Honor, Barbara
22 Harding for Grace.

23 MR. O'NEILL: Good afternoon, Your Honor, James
24 O'Neill for Grace.

25 MR. PASQUALE: Good afternoon, Your Honor, Ken

1 Pasquale from Stroock for the Unsecured Creditor's Committee.

2 MR. FRIEDMAN: Peter Friedman on behalf of the Ad Hoc
3 Committee of Equitey Security Holders.

4 MR. HOROWITZ: Gregory Horowitz from Kramer Levin on
5 behalf of the Official Equity Committee.

6 THE COURT: Wait one second. Thank you.

7 MR. FINCH: Nate Finch from Caplin & Drysdle on behalf
8 of the Asoestos Claimants Committee, Your Honor.

9 MR. MULLADY: Good afternoon, Your Honor, Ray Mullady
10 Orrick Herrington & Sutcliff for the Future Claimants
11 Representative.

12 MR. TACCONELLI: Theodore Tacconelli for Property
13 Damage Committee, Your Honor.

14 THE COURT: Mr. Bernick.

15 MR. BERNICK: Thank you, Your Honor. Ms. Baer is
16 gonna handle, I think, the first five, if I'm not mistaken, of
17 the agenda items.

18 THE COURT: All right.

19 MS. BAER: Good afternoon, Your Honor. Your Honor,
20 the first matter on the call this afternoon is the Debtor's
21 Fifth Omnibus objections to claims. There remains one set of
22 claims outstanding involving environmental contingent clean up
23 costs. We are still -- I should say the Pachulski firm is
24 still working on negotiating stipulations so that we can get
25 those claims withdrawn in some appropriate manner.

1 Unfortunately, they have not yet reached that conclusion. So I
2 have another Continuance Order.

3 THE COURT: All right. Thank you. Okay, this is
4 continued until the November hearing. That's item 1.

5 MS. BAER: Thank you, Your Honor. Item 2, Your
6 Honor, is the Debtor's Motion for an Order Authorizing
7 Settlement of certain tax claims. We filed a Certificate of No
8 Objection, Your Honor, but I did not see that the Order had
9 been entered.

10 THE COURT: I didn't have a chance to get my staff to
11 enter those orders yet. I instructed them to do it this
12 morning. So that -- it should be hitting the docket today or
13 tomorrow. But it will be entered.

14 MS. BAER: Thank you, Your Honor. I do have a
15 duplicate copy. Would that help or hinder the process?

16 THE COURT: It would probably hinder at this point.

17 MS. BAER: Okay. Then we will not submit that. Your
18 Honor, agenda item #3 is the Debtor's Seventeenth Objection --
19 Omnibus Objections to claims. On this, Your Honor, we have
20 received one response from CSX, and we're continuing the matter
21 with respect to CSX while we review the invoices they've
22 submitted. We've received one call from the Cummings firm with
23 respect to their claims. And we are continuing those until
24 November. Four of the Claimants the mail was returned as
25 nondeliverable. We have new addresses. We've resent those out

1 and those will be continued until November. On all of the
2 rest, Your Honor, we're asking for you to enter the Order,
3 which pursuant to Exhibit-A expunges certain claims, and
4 pursuant to Exhibit-B reduces and/or reclassifies certain
5 claims. And I have an Order to present, Your Honor.

6 THE COURT: All right, I'll take it. Thank you.
7 Okay, that Order is entered.

8 MS. BAER: Thank you, Your Honor. That takes us to
9 agenda item #4, which is the Debtor's Motion for Approval of
10 the Lloyds settlement agreement. Your Honor, the parties are
11 working very, very hard to try to resolve this matter. Even
12 this morning another draft was exchanged. We are very, very
13 close. In fact it looks as though everybody's on board, but
14 now a slightly new issue has come up between the Debtors and
15 Lloyds. Under the circumstances, Your Honor, we are hoping we
16 may be able to submit a Certification of Counsel with an agreed
17 settlement agreement shortly. If not, what we would ask is
18 this matter be continued to the November hearing so that we can
19 hopefully finalize this one issue and decide if we're going to
20 proceed or not.

21 THE COURT: That's fine. And if it's continued to
22 November that will simply be as a status conference to let me
23 know what's going on to set further proceedings?

24 MS. BAER: Your Honor, if we could I'd like to have
25 it continued for potential argument. I -- again, I don't

1 anticipate there will be argument. I think we will either
2 resolve this issue or we won't. But that is the only issue
3 outstanding.

4 THE COURT: All right. So if an Order is not
5 submitted on a Certification of Counsel then it will be
6 argued --

7 MS. BAER: Yes, Your Honor.

8 THE COURT: -- in November? Okay.

9 MS. BAER: Correct.

10 THE COURT: And if a COC is submitted then I'll
11 obviously take a look at it and see if that Order can be
12 entered.

13 MS. BAER: Thank you, Your Honor. And I would expect
14 that if you have questions it would then come up for on the
15 November agenda --

16 THE COURT: November.

17 THE COURT: -- for that.

18 THE COURT: Okay.

19 MS. BAER: Your Honor, that takes us to agenda item
20 #5, which is the motion of the Scotts Company to lift the
21 automatic stay to proceed with some litigation on insurance
22 related issues. This matter has come up many times, Your
23 Honor, and there's currently a stay in proceedings with respect
24 to the adversary. It's the Debtor's position that the stay of
25 proceedings should remain as is. It's an issue of shared

1 insurance. To the best of our knowledge, Your Honor, there are
2 no current judgments that have made this contingent potential
3 claim into something more than that. It has a lot of
4 dependency on what's going to happen under the Chapter 11 plan,
5 who's going to ultimately get insurance proceeds. Who would be
6 responsible in the event that there were a liability that arose
7 because of this issue. The only objector, Your Honor, to the
8 continuation of the stay has been One Beacon Insurance Company.
9 And Your Honor, although they've objected to the continuation
10 of the stay it's really -- they seem to indicate that the real
11 issue is how is their claim gonna be treated under the Debtor's
12 Chapter 11 plan?

13 Your Honor, once again, we believe that these issues are
14 slightly premature and a little bit off topic from where we're
15 currently going. We would ask that the stay of proceedings be
16 continued again for a period of several months so we can see
17 where everything else goes and where this ultimately will fit
18 into the process.

19 THE COURT: Good afternoon.

20 MR. PRIMACK: Good afternoon, Your Honor. David
21 Primack, Drinker Biddle & Reath for One Beacon American
22 Insurance Company and once again I come before you to put on
23 the record that we'd like this matter to go forward. This has
24 been continued many times, but essentially we understand how
25 this -- the reasons for the continuance, but again, we'd like

1 to go on the record saying that this should go forward.

2 THE COURT: Yes, I appreciate the fact that at some
3 point I'm going to have to address these issues, but really
4 while these plan negotiations are still in progress I don't
5 think this is the time to do it. So I really do think it has
6 to stay continued for a while longer, and I can't define what
7 while means yet, but for a while. So if you want the Debtor to
8 put this back on the calendar several months in the future I'll
9 do that. Otherwise I'll just deny it without prejudice to
10 reraising the issue at the later time. You're choice. Which
11 do you prefer?

12 MR. PRIMACK: We'll contact the Debtor and try to get
13 it put back on the calendar.

14 THE COURT: Okay, if you tell me when I'll just tell
15 them when to put it back on. Maybe March?

16 MS. BAER: That's fine, Your Honor.

17 THE COURT: March, okay.

18 MR. PRIMACK: Thank you, Your Honor.

19 THE COURT: So I'll continue it to March, the March
20 agenda and we'll see where that goes. Oh, I apologize for
21 taking this out of order, but I'm afraid I'm going to forget.
22 With respect to your cases going forward starting the 2007, I'd
23 like to keep them where they are now, on Mondays at 2 o'clock
24 if that's okay with the Debtors.

25 MS. BAER: That's fine.

1 THE COURT: All right. And I have the August date
2 now too. But it's a Wednesday. It's August 29th in
3 Pittsburgh. I only have one day that week for motions. And so
4 if at all possible could you try to keep this one to a
5 reasonable period in August of 2006 because I'm doing --

6 UNIDENTIFIED SPEAKER: We'll start working at that
7 right now.

8 (Laughter)

9 THE COURT: -- all motions that day. Okay, thank
10 you.

11 MR. BERNICK: Your Honor, I think that brings us to
12 item #6, which I think Your Honor has entered an Order on that
13 that relates to the requirement that certain of Mr. Speights'
14 Claimants provide signatures regarding the Proof of Claim. I
15 think Your Honor has entered an Order on that, right? I
16 believe that some of the claims were withdrawn and some of the
17 signatures were provided.

18 THE COURT: I think that's correct. Let me see if --
19 I don't remember even making a note about that for this
20 hearing, frankly. I remember getting the Order.

21 MS. BAER: Your Honor, it showed up on the docket --

22 THE COURT: I'm pretty sure it was -- oh,
23 Mr. Speights has it.

24 MR. SPEIGHTS: I have a copy of the Order.

25 THE COURT: All right, thank you. I thought I had it

1 entered. I just couldn't remember. I've gone through a lot of
2 Orders in the last couple of days and I was off for a couple
3 days as well. So it's -- it is entered, thank you.

4 MR. BERNICK: There's a deadline that's come up a
5 little bit later on in November for the same issue, that is
6 signatures, now with respect to the '96 Canadian Claimant, so
7 -- but that deadline has yet to come. And I don't know whether
8 -- what will happen at that time. I don't know if Mr. Speights
9 has anything else that he wants to add with regard to item 6.
10 Mr. Speights, do you have anything to add?

11 MR. SPEIGHTS: Nothing, Your Honor.

12 THE COURT: All right. Thank you.

13 MR. BERNICK: Items 7 through 9 are all related in
14 that they all pertain to the Motion for Class Certification by
15 Anderson Memorial, which Your Honor I know will appreciate has
16 been the subject of many rounds of briefing, many rounds of
17 argument, and many preliminary rulings by Your Honor. I think
18 that basically today there's only one substantive matter.

19 Item 9 is basically asking for a date for the final final
20 hearing. If Your Honor still wants to have that final final
21 hearing. Item 8 relates to the -- for the lift stay in order
22 that the record in the Anderson Memorial case be forwarded to
23 Your Honor. I believe that where we stand on that essentially
24 is that the request has been made by Mr. Speights to have that
25 record released to Your Honor. We have expressed our agreement

1 to that request so the matter's now in the hands of the South
2 Carolina Judge. And presumably at some time that will be
3 forwarded to Your Honor.

4 My understanding is that the transcript of that proceeding
5 -- that proceeding took about two days, so it may not be that
6 the record is quite so overwhelming as at least what I had
7 thought, but in any event I guess we'll just have to await the
8 Judge's determination about what to do. We still believe that
9 it might be appropriate for Your Honor to look on the calendar
10 to set a date for the hearing on the theory that that will be
11 forthcoming at some point relatively soon. I know it's very
12 hard to get time on Your Honor's calendar, but we'd just like
13 to get that matter resolved once and for all fairly soon so
14 that it doesn't -- it's just not out there any more.

15 THE COURT: Well, Mr. Speights, is that -- the
16 transcript something that you've been I think asserting that I
17 should read in connection with making this decision on the
18 merits. And so can I proceed until I get it or can we do the
19 argument and then when I get the hearing we can -- I can
20 address whatever I need or do you need to rely on that
21 transcript in order to make your arguments?

22 MR. SPEIGHTS: Two things, Your Honor. Number one, I
23 do think you need to have that as part of the record when we
24 make the arguments. However, as circumstances would have it,
25 after I got to Wilmington today I got an e-mail from our office

1 saying Judge Hayes' law clerk called and wanted me to call him
2 concerning the order that we sent him, and Mr. Bernick's now
3 agreed to a petition and an order. And said that Judge Hayes
4 was on the bench in Union County South Carolina and to leave a
5 -- call a certain number and leave a message. I have not done
6 so because we had this discussion about ex parte calls, even
7 returning a law clerk's call. I assume I could return the law
8 clerk's call. But I want to make sure I can to see the status.
9 I'm not even sure that he has Mr. Bernick's response. I think
10 it went in Thursday or Friday. But I probably could find out.
11 I would think that this would be, you know -- I don't think
12 this will delay us getting the record here. Because you had
13 talked in terms of at least carrying it over to November. Not
14 being heard today.

15 But my second point is I would prefer your hearing the
16 discovery matters, which are impacted by item 7, before we get
17 to item 9, the scheduling of the hearing. And if we could do
18 that then I could tell you more concretely when I think the
19 matter would be ready for the hearing.

20 THE COURT: All right.

21 MR. BERNICK: I don't have -- I'm happy to accede to
22 that request. It's appropriate from Your Honor's point of
23 view. Although it seems to me that what we're talking about is
24 the transcript. With respect to the call that's been received
25 by the Court, I think it would be relatively easy for

1 Mr. Speights to simply set up a conference call and we can find
2 out what the nature of the inquiry is.

3 THE COURT: That's fine. I think if that's the case
4 I think you folks can work that out.

5 MR. BERNICK: Yeah.

6 THE COURT: If it's just a matter of word smithing an
7 order then I don't think it's gonna be a problem. If he wants
8 to know what's going on then you can all tell him.

9 MR. BERNICK: Right.

10 THE COURT: So, okay.

11 MR. BERNICK: On the Motion for Protective Order,
12 happen to take that up, Your Honor will -- may or may not
13 recall that the class certification was set for hearing -- the
14 motion was set for hearing originally in December. In fact
15 there was a hearing that took place in December, and on the eve
16 of the hearing there were deposition notices served on Grace
17 for 30(b)(6) depositions on a variety of topics. We moved
18 promptly for Protective Order against those depositions. And
19 we submitted a brief in support of that motion. There was a
20 pretty short response that was filed by Mr. Speights, and then
21 essentially the matter was held in abeyance after the hearing.
22 And while Your Honor had asked for the briefing on notice and
23 the issue of notice.

24 The only other development that's taken place since that
25 time is that at the last hearing Mr. Speights I think was

1 pretty clear in indicating that a portion of the notice that
2 related to the issue of class notice was no longer being
3 pursued because Your Honor already had ruled on that. Which to
4 our reckoning then means that there are three different subject
5 matters that remain at issue as concerns the 30(b)(6) notice.
6 In fact -- that's attached to our brief. The first is Debtor's
7 knowledge of in prepetition efforts to settle the Anderson
8 Memorial class action. The second is the Debtor's knowledge of
9 efforts in 2001 to exclude Anderson Memorial, Speights &
10 Runyan, or Daniel Speights from the Official Committee of
11 Property Damage Creditors. And then final, Debtor's
12 communications with the Cellotechs Asbestos Settlement Trust
13 regarding property damage claims filed by Speights & Runyan or
14 through Anderson Memorial.

15 Your Honor, these are no more relevant to the issue of
16 class certification than they were before. They are patently
17 irrelevant. The first one relating to prepetition settlement
18 efforts, don't know that that would even be appropriate for
19 discussion before the Court. I don't know if there were any.
20 I personally don't know if there were any. But whatever they
21 are they're not appropriate for discussion here. And they
22 can't bear on class certification because as Mr. Speights and
23 Your Honor I know well know you can't certify a class for
24 settlement purposes using a standard that's different for
25 settling it -- certifying it for litigation purposes. So

1 whether or not that the suggestion here is that somehow
2 Anderson Memorial might be, even after we've gone through the
3 whole process of ferreting down the Anderson Memorial -- the
4 claims that would have been Anderson Memorial class -- claims,
5 that is would have been encompassed in the class and I think
6 there are now a total of only three claims left that would have
7 even been in that class. But the whole idea that somehow this
8 class should now be certified because in some fashion it might
9 facilitate a settlement effort is contrary to the rules under
10 -- the Rule 23 law, and moreover would not be appropriate
11 subject matter for discussion on the record in this proceeding
12 before the Court.

13 With respect to the second item, which is the efforts to
14 exclude Anderson Memorial from the Official Committee of
15 Property Damage Claimants, again, totally and completely
16 irrelevant to any matter that's posed by class certification.
17 Again, I'm not assuming that there were any such matters, but
18 under any set of circumstances they are irrelevant.

19 And then finally, the Debtor's communication with the
20 Cellotechs Asbestos Settlement Trust. Again, I don't know what
21 it is that Mr. Speights has in mind, but whatever it is it is
22 completely and utterly irrelevant to the issue of class
23 certification.

24 And so we really have three efforts that I think pretty
25 much on their face read out as #1, being a suggestion that Your

1 Honor should certify because it will facilitate settlement,
2 that being an improper suggestion. And that #2, somehow
3 there's been action to the detriment of Mr. Speights that I
4 think in connection with other litigation or in connection with
5 his service on the Property Damage Committee, and that again is
6 entirely irrelevant to any of the factors that are germane to
7 certification under Rule 23.

8 So for all those reasons we believe that our Motion for
9 Protective Order is well taken, that the discovery should not
10 proceed, and that there's no reason why in any way, shape or
11 form this should cause the delay in our schedule of finally
12 moving to a resolution of this issue that's been kind of
13 hanging out there for a while. So we would ask that this
14 motion be granted, that the 30(b)(6) notices be an nullity and
15 quashed, and we further would ask that time be set for class
16 certification -- the class certification hearing. We're
17 prepared to proceed on that at Your Honor's convenience.

18 THE COURT: Mr. Speights?

19 MR. SPEIGHTS: May it please the Court. In the
20 papers that Grace filed in opposition to this discovery it said
21 that -- suggested that the -- Anderson filed these notices for
22 purposes of delay. I filed the notices last December. And I
23 certainly haven't interposed them for purposes of delay. I
24 believe that we are entitled to this discovery to get
25 information which may lead to the finding of admissible

1 evidence on the certification issue.

2 I think that we can take these depositions very quickly.
3 Could have taken them back in January. I filed the notices
4 within a week or two after they filed their opposition to the
5 certification, which raised certain factual issues.

6 Now specifically -- somebody turned off the chart. I'd be
7 happy to have it up there.

8 (Pause in proceedings)

9 Specifically, although we're not far apart on one thing,
10 he says there are three notices, I think, we're down to. We're
11 down to three notices because Your Honor ruled on the other
12 notices about -- that Your Honor thought were in conflict with
13 the Bar Date Order. Although there are three orders there are
14 four subjects. And I'll be happy to start with where Mr.
15 Bernick started, and that is with the so-called settlement
16 issue.

17 We have asked to depose a person and asked Grace to
18 produce the documents at that deposition of the person
19 knowledgeable about Grace's attempts to settle the Anderson
20 class action prebankruptcy. Now why is that important? It's
21 important for the reason Mr. Bernick just articulated. That
22 under law you cannot have a settlement class that does not meet
23 the criteria for a litigation class. That was decided in the
24 Georgine decision, which is famous among asbestos lawyers. And
25 the reason that is important, Your Honor, is that we expect to

1 be able to show Your Honor at the certification hearing that
2 Grace made attempts to settle Anderson and told Anderson that
3 if Anderson --

4 MR. BERNICK: Your Honor, I'm sorry. It would be
5 inappropriate at this point for Counsel to get into any aspect
6 of settlement discussions. I don't know what he is going to
7 say. I don't know the content of it. I've not been informed
8 of it, but it's not appropriate for discussion before the
9 Court. There's been an awful lot of that. And I think that
10 that is not appropriate here.

11 MR. SPEIGHTS: Your Honor, there are rules and there
12 are exceptions to rules. What I am trying to show, and I can
13 deal with it a little bit hypothetically, not conceding
14 Mr. Bernick is right, but I believe I can circle the wagons a
15 little differently on the argument.

16 What we are trying to show is an admission by Grace which
17 is inconsistent with the position it has taken and presumably
18 will take before you in connection with the certification
19 hearing. We want to know whether Grace -- we can show Grace
20 through its own documents has taken a position that it would be
21 willing to settle the Anderson class --

22 MR. BERNICK: Your Honor, again --

23 MR. SPEIGHTS: We want to know whether --

24 MR. BERNICK: -- this is --

25 MR. SPEIGHTS: -- it's taken that position.

1 MR. BERNICK: Now, this is not a game of how we can
2 tease being close to being the edge here. We all know where
3 this is going. It's improper and it's not germane. For Mr.
4 Speights to be commenting on the settlement proceeding is
5 improper, it's incorrect under the rules --

6 THE COURT: I --

7 MR. BERNICK: -- the 6th Circuit has decided this
8 issue.

9 THE COURT: I don't think that's the -- what he's
10 attempting to do. What he's trying to show at this point is
11 that if you can't have a class for settlement purposes that's
12 different from litigation class and the Debtor agreed to have a
13 settlement class that the Debtor must recognize that there is
14 therefore some appropriate basis to have a litigation class.

15 Now, you can't get into the settlement discussion, so how
16 exactly that's going to arise I don't know. But it seems to me
17 to be calculated to lead to reasonable and discoverable and
18 admissible evidence. Whether or not it turns out to be that is
19 a different issues --

20 MR. BERNICK: Well --

21 THE COURT: -- but the standard for now is only
22 whether it's calculated, reasonably calculated to get there.

23 MR. BERNICK: But that's precisely the problem, is
24 that in explaining how it is reasonably calculated he has told
25 us what it is that he is going to attempt to find. And what he

1 is going to attempt to find is improper. It is not calculated
2 to leave to discovery of relevant evidence because it itself is
3 not admissible. Settlement discussions including the content
4 of settlement discussions are not admissible for --

5 THE COURT: That's right. But the fact of settlement
6 discussions is admissible.

7 MR. BERNICK: I have no problem with the fact of
8 settlement discussions. I don't think it's relevant. It's not
9 precluded by 408. But he's telling you the content of the
10 settlement discussions.

11 THE COURT: Well, okay. For this purpose I'm not
12 paying any attention to the content of settlement discussions.
13 You know, to the extent that you think there was some
14 information that led to that, I don't really recall it or see
15 it that way, but in any event that's stricken. But I don't
16 think that's at this point what Mr. Speights is attempting to
17 get to.

18 MR. BERNICK: Well, just -- I --

19 THE COURT: He's attempting to establish the fact
20 that there was a settlement under way. Without regard to what
21 the terms of that settlement were.

22 MR. BERNICK: If that's what he wants to say he can
23 say that. He doesn't have to describe the content. And that
24 in and of itself would be inadmissible and improper to consider
25 as part of a Rule 23 litigation class. Whether or not the

1 class could be certified for settlement is completely and
2 utterly irrelevant. You've got to meet the requirements of
3 Rule 23 for litigation purposes. Not a single one of those
4 requirements relates to settlement.

5 So what is the element of Rule 23 as to which this
6 discovery would make the -- as to which this discovery would be
7 relevant? That is would go to their ability --

8 MR. SPEIGHTS: Your Honor --

9 MR. BERNICK: -- to establish that an element of Rule
10 23 has been met.

11 THE COURT: All right.

12 MR. SPEIGHTS: Your Honor, I understand it.

13 Mr. Bernick had an objection. And he stood up and made it and
14 we headed down another track. But I hope the noninterruption
15 rule is in affect because I haven't even begun to go down the
16 track. I understand -- I agree with Your Honor about what we
17 want, you know, to show, Your Honor, but --

18 THE COURT: I think his point is that you need to
19 show me how it's relevant to a specific element of Rule 23, and
20 I agree with that. So tell me how it's relevant.

21 MR. SPEIGHTS: Well, I'm going to, but before I get
22 to that let me just correct what has now be said. The
23 objection that somehow we can't discuss it. As the record will
24 show when it is provided to you we will be able to address this
25 more fully, but Judge Hayes' Final Order --

1 MR. BERNICK: Your Honor, I'm sorry --

2 MR. SPEIGHTS: -- which you have the Order --

3 MR. BERNICK: I'm sorry.

4 THE COURT: I have the Order.

5 MR. BERNICK: He's got an Order that doesn't have
6 anything to do with the content of the discussions. And if it
7 does it shouldn't be gone into. It's not a game here.

8 MR. SPEIGHTS: The Order -- Your Honor, I invite you
9 to read the Order about what it says about the old settlement
10 issue with Grace. It's addressed in Judge Hayes' Order. Now
11 I'm trying to expedite this matter. We can wait until we get
12 to whole record and I can come back before Your Honor and say
13 it's all out on the table, and therefore I want to see what
14 Grace has said in its internal documents, what its most
15 knowledgeable witness has to say about this subject matter,
16 okay? That's why I want to do it right now. I'm trying to
17 expedite this as quickly as I can. Why is it admissible? Why
18 is it relevant? Because hypothetically if Grace agreed to
19 stipulate to a settlement class then as Your Honor pointed
20 out --

21 MR. BERNICK: Your Honor, I object and ask for an
22 instruction to Mr. Speights to abide by the rules here. It is
23 improper to get into this material. He's yet to establish the
24 predicate that Your Honor asked for, which is what element of
25 Rule 23 does this go to? He hasn't told us that.

1 THE COURT: Okay. Well I do want to know what
2 element of Rule 23 it goes to, but I don't see that he's in
3 violation of anything. He said if Grace agreed to stipulate to
4 a settlement class, and then I didn't hear the rest. So I
5 don't know what the end result of the if is. But what element
6 of Rule 23 are we talking about first, Mr. Speights?

7 MR. SPEIGHTS: All elements, Your Honor. If Grace
8 was agreeing -- if Grace agreed that there should be a
9 settlement class, ipso facto Grace agreed that all the criteria
10 for a litigation class were present. Period. End of story.
11 And that's why I want to establish that through Grace's own
12 witness and whatever documents it has. It shouldn't be a long
13 deposition. I've wanted it since December. It may or may not
14 lead to admissible -- to the production of evidence which will
15 be admissible before Your Honor, but let me just go take the
16 deposition and we'll get to the bottom of it.

17 THE COURT: All right. The fact that someone agrees
18 to settle an issue does not necessarily mean that on the merits
19 they're going to have the same position. So although I think
20 some of this may lead to relevant -- I think it's calculated to
21 lead to relevant admissible evidence, I'm not sure that even if
22 you find that Grace did make that agreement that it is going to
23 be relevant and admissible evidence because the fact that
24 parties will do something to settle does not mean that they
25 have the same position with respect to ongoing litigation. If

1 it did we'd never settle anything.

2 MR. SPEIGHTS: But Your Honor, when it comes to Rule
3 23 in Georgine I think it's probably best that we wait until
4 after the deposition because what exactly they agreed to
5 Mr. Bernick doesn't want me to discuss and what they agreed to
6 will be established on the record at a deposition and any
7 contrary evidence we might have, and I believe I'll be in a
8 position at the certification hearing to present to you
9 admissible evidence on that point.

10 THE COURT: Well, it still seems to me that it's
11 calculated to lead to that evidence so I'm going to permit the
12 deposition to go forward on that score. But it's subject to
13 all objections and claims of privilege and everything else.
14 And it's not a ruling that says that you're going to get any
15 admissible evidence. It's simply an agreement that the
16 deposition can go forward because it's calculated to get
17 irrelevant evidence.

18 MR. SPEIGHTS: Now Your Honor --

19 MR. BERNICK: Your Honor, I would have to say -- Your
20 Honor I'd like to have -- make a record on one point and then
21 advise the Court on what I think the impact of this is.
22 Counsel's asked specifically for what is totally and completely
23 precluded by Rule 408. The whole purpose of Rule 408 says that
24 even if it is -- even if it's completely material, even if it
25 might be dispositive were it to come into evidence statements

1 made during the course of a settlement discussion, be they
2 admissions or otherwise usable under the rules, are not usable.
3 Are not admissible.

4 THE COURT: Well --

5 MR. BERNICK: And so if he gets what he wants, which
6 is let's presume that some representative of Grace completely
7 authorized says, you know Mr. Speights, I really think for
8 purposes of our settlement discussion here we will be able to
9 agree with you that Rule 23(a) is satisfied, that Rule 23(b) (3)
10 is satisfied, all of those as plain admissions would otherwise
11 be admissible under the Rules of Federal Evidence in so far as
12 they're relevant or material, but are exactly what is barred by
13 Rule 408. And not only are they barred by Rule 408, but we
14 believe that the law in this country is that they're not even
15 discoverable because of the chilling affect that this would
16 have. This is the Goodyear decision out of the 6th Circuit,
17 and if Your Honor enters this Order I'm highly confident that
18 we will instruct our witnesses not to answer these questions,
19 and then we certainly shouldn't schedule the class
20 certification hearing that turns on this because we will take
21 an appeal. We cannot be sitting here having our settlement
22 discussions in an unconsummated settlement be considered as
23 judicial admissions for purposes of class certification.

24 THE COURT: Well, I don't know. Because I don't know
25 what those discussions are at the moment. And if in fact Grace

1 made, I don't know, a decision that all of the elements for
2 class certification of a settlement class could be met then I
3 think Mr. Speights is correct that means that you've agreed
4 that there can be a litigation class settle.

5 MR. BERNICK: That's again --

6 THE COURT: A litigation class, pardon me.

7 MR. BERNICK: With due respect, that's the whole
8 purpose of Rule 408. If the settlement had been consummated
9 Grace had written that down in writing and submitted it in
10 saying this is a settlement that we have now agreed to and for
11 some reason it didn't go forward, even if it were consummated
12 it would not be admissible to prove the elements of a
13 litigation class because it would be barred under Rule 408. It
14 is a settlement. It's not usable for litigation purposes.
15 That's the entire purpose for the rule. This one wasn't even
16 consummated. So you have a nonconsummated settlement
17 discussion where the very fact that Grace entered into those
18 discussions, if in fact it did, is then used to certify a
19 litigation class over its objection. That's just absurd. And
20 for a deposition to take place would violate Grace's rights.
21 That's the whole reason that's not discoverable and would have
22 that chilling affect and that's exactly what the 6th Circuit
23 decided in Goodyear.

24 Now Your Honor, we have been through in fact this very
25 issue in connection with other matters. And if Your Honor

1 wants to have the briefing on this we will do the briefing. If
2 Your Honor orders this to take place I don't think that I would
3 have any choice but to advise my client that they --

4 THE COURT: The only --

5 MR. BERNICK: -- should not proceed with this
6 deposition.

7 THE COURT: The only objection that I can see at the
8 moment is, if -- the chart's not back up, that the Debtor is
9 basically contending that the elements that Mr. Speights is
10 attempting to find essentially are not relevant. Now I don't
11 know whether --

12 MR. BERNICK: No --

13 THE COURT: I'm sorry.

14 MR. BERNICK: I'm sorry. They are not relevant
15 because they cannot be considered as part of a class
16 certification hearing, and they cannot be considered as part of
17 a class certification hearing because they're barred by the
18 Rules of Evidence, Rule 408. So if Rule 408 weren't there
19 would they be admissions? Sure, they might be admissions.
20 Would they be admissions that would be relevant to the
21 proceeding? If they're specific enough and they relate to
22 matters of fact, yes, they might be considered to be admissions
23 that are relevant to the matters of fact that are implicated by
24 Rule 23. But there's something called Rule 408. And Rule 408
25 says that they're not admissible for that purpose. And because

1 they're not admissible for that purpose they are irrelevant to
2 class certification.

3 THE COURT: Okay, just a minute.

4 (Pause in proceedings)

5 THE COURT: All right. Well, Rule 408
6 says, "Evidence of 1) furnishing or offering or promising to
7 furnish or 2) accepting or offering or promising to accept a
8 valuable consideration in compromising or attempting to
9 compromise a claim which was disputed as to either validity or
10 amount is not admissible to prove liability for or invalidity
11 of the claim or its amount." That does not appear to be what
12 Mr. Speights is attempting to get to.

13 The second sentence says, "Evidence of conduct or
14 statements made in compromise negotiations is likewise not
15 admissible. This rule does not require the exclusion of any
16 evidence otherwise discoverable merely because it is presented
17 in the course of compromise negotiations. This rule also does
18 not require exclusion when the evidence is offered for another
19 purpose such as proving bias or prejudice or a witness,
20 negating a contention of undue delay, or proving an effort to
21 obstruct a criminal investigation or prosecution." So where
22 within that rule does this fit, Mr. Speights?

23 MR. BERNICK: The second prong.

24 MR. SPEIGHTS: I don't think it fits at all, Your
25 Honor.

1 MR. BERNICK: It absolutely -- exactly the second
2 prong.

3 THE COURT: Well, it's in settlement -- if it's in
4 settlement discussions it -- I mean --

5 MR. SPEIGHTS: It's not offered to establish
6 liability. It is an issue on certification for the Court, not
7 for the jury of course, and the rule recognizes for such things
8 as -- I don't -- I can read the rule as Your Honor just read
9 it, for other purposes we can use it.

10 THE COURT: Some things.

11 MR. SPEIGHTS: For some things.

12 THE COURT: Yes.

13 MR. SPEIGHTS: But it doesn't purport to list
14 everything you can use it. We're not in the face of the rule
15 trying to say Grace should pay X dollars because of any
16 discussion that was held in South Carolina. We're on the issue
17 of whether there's an admission by Grace -- and Mr. Bernick has
18 acknowledged that if there was an admission it might be used
19 and whether it can get around that admission by claiming that
20 it was in the context of settlement discussions. Well, there
21 are all sorts of issues that might arise about that, but it's
22 an admission, it may be a start. Your Honor has ultimate
23 authority on whether there's a certified class or not a
24 certified class. But I don't believe the rule holds it out.
25 And I've got another argument that I can't use until I get that

1 record before Your Honor as well that I think obviates the
2 necessity of all of this. But I don't have the record yet
3 until we call Judge Hayes.

4 THE COURT: Well --

5 MR. BERNICK: That's tantalizing.

6 (Laughter)

7 MR. BERNICK: Your Honor, I only -- evidence of
8 conduct or statements made in compromise negotiations is
9 likewise not admissible.

10 THE COURT: That's right.

11 MR. BERNICK: That plainly implies. The exclusion
12 that they then offer, and that's independently of whether
13 there's an offer for a given amount. Really the two sentences
14 work together. Because one deals with an offer of compromise,
15 the other goes beyond that and deals with statements made
16 during the course of discussions relating to a potential offer
17 to compromise.

18 Now the third sentence is the only way that Mr. Speights
19 could argue that somehow there's an exception. It says, "This
20 rule does not require the exclusion of any evidence otherwise
21 discoverable merely because it is presented during the course
22 of compromise negotiations." Now this rule does not require
23 exclusion where the evidence is offered for another purpose.
24 There are no other purposes that would apply here, and this is
25 not a situation where evidence is otherwise discoverable but

1 merely was presented during the course of compromise
2 negotiations. And how do we know that? Because the admissions
3 that he's seeking are specifically statements that would only
4 be made in the context of a class settlement negotiation. That
5 they are admissions that go the whole idea of class
6 certifications. So this is not admissible evidence that would
7 otherwise be discoverable and simply happen to come up during
8 the course of settlement discussions. These were made
9 precisely because there was settlement discussions underway, if
10 in fact they're under way.

11 And the affect of this is really dramatic. You have a
12 discussion between Mr. Speights and I about settlement. That
13 might be hard to conceive of at this time.

14 (Laughter)

15 MR. BERNICK: But let's assume that there were
16 discussion about settlement between Mr. Speights and I. And he
17 said -- he says, "Bernick, even though we never get along I'll
18 give you a class settlement and all you have to agree is the
19 requirements of Rule 23, and then we'll talk about money. Will
20 you agree that if the money is right we'll have a discussion
21 about class settlement?" I said, "Absolutely, Dan, if the
22 money is right, fine with me. We'll have a discussion and we
23 may well agree Rule 23(a), (b), (3) they all apply." He
24 says, "Terrific." I say, "Now how much money do you want?" He
25 says, "\$9 billion." And I say, "You know what, that's just not

1 right. I've got a dollar in mind. I guess we don't have a
2 deal" --

3 MR. SPEIGHTS: I'll meet you half way.

4 (Laughter)

5 THE COURT: Sold.

6 MR. BERNICK: There's a little bit too much of that
7 in this case. That's the problem, Your Honor. So he then
8 turns around and files a Motion for Class Certification,
9 says, "Oh, we don't have -- all these briefs, Your Honor, we
10 don't need all of that stuff. We can go proceed. And the fact
11 of the matter is that Mr. Bernick has now admitted a way the
12 certifiability of this class under Rule 23 during the course of
13 the settlement discussions." That's the whole reason -- if
14 that were the case you would never have any settlement
15 discussions because people would never be able to have a
16 discussion without there coming back on them.

17 THE COURT: Well, I think that is the purpose for the
18 second sentence, that the evidence of conduct or statements
19 made in compromise negotiations is not admissible. So unless
20 there is another way to get to this, Mr. Speights --

21 MR. SPEIGHTS: Well, Your Honor --

22 THE COURT: -- I think you're -- I think
23 Mr. Bernick's correct that it can't be calculated to lead to
24 admissible evidence because it's not admissible.

25 MR. SPEIGHTS: Your Honor, let me respond three ways.

1 First of all, I could give you a hypothetical like Mr. Bernick.

2 THE COURT: Well, I don't need another hypothetical.

3 MR. SPEIGHTS: Okay.

4 THE COURT: Because that's not the basis for my
5 ruling.

6 MR. SPEIGHTS: It would be quite different, but I'm
7 not going to that. I was just gonna say that, okay. Quite
8 different than the one he said. Number two, Your Honor, as
9 Your Honor pointed out Mr. Bernick did not raise 408 in his
10 papers. I don't mind -- I mean, I understand he can raise it
11 today, I'm raising things today, but if Your Honor is concerned
12 about Rule 408, which I haven't looked at because we don't have
13 settlement discussions in this case, so I haven't seen 408 in a
14 long time.

15 THE COURT: I am concerned about it. If you want to
16 brief it that's fine.

17 MR. SPEIGHTS: And tee this aspect of it up by
18 November, and by then I will have the record in South Carolina
19 which may add further light on this issue.

20 THE COURT: All right, that's fine.

21 MR. SPEIGHTS: But there are three other issues in
22 the deposition notices beside the so called settlement issue.

23 THE COURT: Okay. Let me make a note to this one
24 though. How much time do you folks -- can you brief it in time
25 for the November hearings now?

1 MR. BERNICK: Sure.

2 MR. SPEIGHTS: Yes, Your Honor. I think it --

3 THE COURT: All right.

4 MR. SPEIGHTS: I think he is objecting on that ground
5 and just give me a reasonable time. Give me the same amount of
6 time he takes to object.

7 MR. BERNICK: So that we would have the class -- we'd
8 have -- just this issue for the November hearing?

9 THE COURT: Well, I don't know what else. But for
10 now this issue. I have to take them one at a time. By the
11 time we get through these I probably won't remember what's
12 going to be on the November hearing list. So let's just knock
13 them down one at a time. For now the 408 issue. I need a
14 brief. Can it be briefed in time for the November hearings?

15 MR. BERNICK: I suppose so. Yes -- the answer's yes,
16 Your Honor.

17 THE COURT: All right. Then you two work out a
18 schedule. Can you do that? The Debtor -- it's the Debtor's
19 objection on Rule 408. The Debtor should go first. Mr.
20 Speights, you can go second. Hopefully I don't need any
21 replies. Because this issue should, I think, be articulated
22 well enough in the papers. All right, so the Debtor first and
23 then Mr. Speights. And then it will be argued in November.

24 MR. SPEIGHTS: Your Honor, the second thing we ask in
25 connection with Anderson, and it may be on that board, but I

1 don't think it is, is that we ask for the person most
2 knowledgeable about the property damage claims and class action
3 proceedings brought by Anderson through the law firm of
4 Speights and Runyan. It was not just limited to the settlement
5 issue. In affect what we ask for is what Grace knew, the
6 person most knowledgeable about what Grace knew about Anderson
7 historically. And the reason -- and for documents relating to
8 that. And --

9 MR. BERNICK: What are -- which notice is that?

10 MR. SPEIGHTS: Mr. Bernick, I'll be glad to go get my
11 notebook and pull out the notice if you like. You don't
12 believe you have it?

13 MR. BERNICK: I have them all. I just -- there are
14 like five of them.

15 MR. SPEIGHTS: My -- the Committee's local Counsel
16 says it's Committee-C.

17 MR. BERNICK: C?

18 MR. SPEIGHTS: Committee -- Exhibit-C to your Motion
19 for Protective Order.

20 THE COURT: I'm sorry, so you're doing something
21 that's not on this chart?

22 MR. SPEIGHTS: Yes, it's not on Mr. Bernick's chart.
23 This was the one -- I said there were four actually, and he put
24 up three.

25 THE COURT: All right.

1 MR. SPEIGHTS: But there's a fourth one. His
2 Exhibit-C to the Motion for Protective Order. My copy of the
3 notice. And essentially, Your Honor, what it says is we want
4 to depose the person at Grace most knowledgeable about
5 Anderson, and the documents relating to that. And why do we
6 want that? Again, Your Honor, it's a question of admissions.
7 Grace has now for, at least starting in the summer of 2005,
8 made a large number of statements about the history of the
9 Anderson certification process, about Anderson itself,
10 suggesting that it's some fly-by-night certification down in
11 South Carolina, et cetera, et cetera.

12 So first of all, I want to see what Grace said not through
13 their lawyers and this Courtroom, but what it says back home in
14 Boca Raton or Columbia, Maryland about Anderson. They may have
15 said nothing. I believe they've said a lot because Anderson
16 was filed in December 1992 and was a very actively litigated
17 case over those years. So we want to show that, what Grace
18 said internally is at odds with the position Grace has taken
19 before Your Honor about the status of Anderson and the
20 seriousness of Anderson, et cetera, et cetera.

21 THE COURT: I'm sorry --

22 MR. SPEIGHTS: The other thing --

23 THE COURT: You said it was filed when? The
24 Anderson --

25 MR. SPEIGHTS: December 1992.

1 THE COURT: Okay. That's what I thought. All right,
2 sorry, go ahead.

3 MR. SPEIGHTS: The second thing, Your Honor, is along
4 the same line, same argument, admissions by a party opponent.
5 What has Grace said about the certification issues behind the
6 scenes? As if, for example, taken positions in its internal
7 documents about commonality, and typicality, and numerosity and
8 all these issues. I want to ask the person most knowledgeable
9 at Grace about these issues. Maybe he didn't say anything.
10 That will be a very quick deposition. Maybe there are no
11 documents. That will be even quicker.

12 But it may be that Grace has taken positions not in terms
13 of settlement as we dealt with on the first issue, but in
14 affect the same substantive question here, has Grace made
15 admissions internally that are consistent with our getting a
16 certified class? I'm not suggesting to Your Honor today that
17 because Grace is somewhere in its company said Anderson should
18 be certified or will be certified Your Honor has to follow
19 that. But I do think it's evidence on that. So we are asking,
20 as #2, your Honor, the person most knowledgeable about Anderson
21 and the history of Anderson down below.

22 The third thing, Your Honor, is -- and it's one of those
23 up there, Grace's efforts to keep Anderson Memorial Hospital
24 off the PD Committee in Grace. Anderson was kept off the PD
25 Committee in Grace for a period of weeks, and the U.S. Trustee

1 allowed us back on after we clarified the history of Anderson,
2 et cetera, et cetera. Your Honor, the same question arises
3 with respect to that. What did Grace tell the U.S. Trustee?
4 What communications did it make to the U.S. Trustee about the
5 status of Anderson Memorial Hospital when it -- when and if,
6 and I believe it's when, Grace convinced the U.S. Trustee to
7 keep Anderson Memorial Hospital off the PD Committee. As Grace
8 always says, there are only seven cases out there. Only four
9 or five of which was active, and Anderson had been the most
10 active, maybe the most active or second longest case against
11 Grace at this time. There were communications, we believe, and
12 we want to establish what those communications were, and we
13 believe that we may establish in that some information that is
14 either totally at odds with what Grace has been telling Your
15 Honor about the history of Anderson, or that there may have
16 been some misleading statements made to the U.S. Trustee about
17 the history at Anderson, which where at odds with the facts in
18 this case.

19 The fourth thing, Your Honor, is the communications with
20 the Cellotechs Asbestos Settlement Trust or other persons
21 involved with Cellotechs. While it's been a few months since
22 this issue has been before Your Honor at various times on both
23 Mr. Bernick and Ms. Browdy referred to what was happening with
24 Anderson's claims in the Cellotechs Bankruptcy. As Your Honor
25 knows from previous presentations, the Cellotechs claims

1 administrator allowed Anderson's claims for several hundred
2 millions of dollars of which they were allowed at 12 cents on
3 the dollars, which is the pay out percentage in the Cellotechs
4 bankruptcy.

5 Now Mr. Bernick has attempted to attack what happened in
6 Cellotechs in some way. Frankly, I'm not sure exactly what he
7 said last summer and at other hearings, or Ms. Browdy exactly
8 what they said, but we want to establish what communications
9 Grace has had from that record or any basis of their attack on
10 Anderson's claims because we think it's important, not
11 dispositive but important if we can tell you that in another
12 Court in Florida, Tampa, Florida, a Court issued a Plan of
13 Reorganization under which Anderson has been allowed claims,
14 albeit litigations ensued between all the PD Claimants down
15 there, or most of the PD Claimants down there, and Cellotechs,
16 which is Cellotechs Trust, which is now pending in the 11th
17 Circuit Court of Appeals, but we think that decision may well
18 be entered -- it was argued in April -- by the time we get to
19 the certification hearing before Your Honor.

20 But in any event, we want to know the basis of what Grace
21 knows about Cellotechs so that when they again continue to use
22 it against us in the certification battle we'll be prepared.
23 Bottom line, Your Honor, is I believe from an issue of this
24 magnitude these notices served in December are just clearly
25 meant to show admissions by Grace inconsistent with their

1 positions taken before Your Honor. I can't imagine the
2 depositions lasting more than two days. And I'll be happy to
3 take them next week.

4 THE COURT: Okay. I'm a little confused about the
5 purpose for trying to get into what Grace knows about the
6 Cellotechs case. Because what difference does it make whether
7 Anderson had allowed claims there or not? The issue is whether
8 Anderson has allowed claims here that should subject the
9 Claimants to a class action. Not whether they where or weren't
10 subject to a class action in Cellotechs, which is a different
11 Debtor with is different structure and different issues, isn't
12 it?

13 MR. SPEIGHTS: Well, all of that's certainly true,
14 Your Honor. I think, again, what we would say is that the
15 Debtor has been communicating to you about Anderson and
16 Cellotechs, trying to cast aspersions on the allowance of
17 Anderson's claims in Cellotechs. And we believe that if the
18 Debtor's gonna be allowed to [quote}, "talk trash" about
19 Anderson's claims in Cellotechs we ought to know the basis of
20 their communications. We need to have their communications
21 with somebody, and I don't know who they've been talking to. I
22 don't even know for sure they've been talking to somebody --

23 THE COURT: But why --

24 MR. SPEIGHTS: -- as to what the basis to say
25 Mr. Bernick knows that when he says there's -- that the

1 Cellotechs Asbestos Trust Mr. Z has taken the position that
2 XYZ.

3 THE COURT: But why do I care? I mean, as a matter
4 of evidence when we get actually to litigate this issue why do
5 I care what somebody did in the Cellotechs case with respect to
6 this? And how's it going to be relevant? I'm missing the
7 connection between what difference it's going to make in this
8 case, what happens --

9 MR. SPEIGHTS: Because it might be from my
10 standpoint. If you're asking why should you care about what
11 Mr. Bernick says and I don't think you should, but if you're
12 asking about what I say, I say it's relevant because it's a
13 precedent. It's simply a precedent. There is another
14 bankruptcy out there with another Bankruptcy Court had before
15 him claims filed on behalf of Anderson Hospital for itself and
16 behalf of a number of other Claimants. And it's a precedent of
17 how those claims were handled there. Is it binding on you?
18 No. Is a central west end class binding on you? No, but it's
19 a precedent to show that this is the way that other Courts have
20 dealt with class certification issues. So --

21 THE COURT: So what you're telling me is in the
22 Cellotechs case Anderson is a class -- nominal class Plaintiff
23 for a class --

24 MR. SPEIGHTS: No, Your Honor. I'm not telling you
25 that. Let me be crystal clear about this. Anderson filed a

1 class claim on the alternative, a group claim in the Cellotechs
2 bankruptcy. At that time Anderson had not been certified, and
3 moreover, Cellotechs was already in bankruptcy before 1992 when
4 Anderson filed its lawsuit. So again, Anderson files --
5 Cellotechs files bankruptcy in '90, Anderson files bankruptcy
6 in '92. We filed a claim on behalf of Anderson Memorial as a
7 class claim, or on the alternative as a group claim. The Court
8 enters a Plan of Reorganization. Under that Plan of
9 Reorganization, as interpreted by the claims administrator
10 Anderson was a group Claimant entitled to recover for these 50
11 or 60 building owners around the country. And that's the
12 status of the matter. Although it's now being challenged by
13 the Asbestos Settlement Trust and some of my good friends in
14 this very room today, and that matter will be decided by the
15 11th Circuit, in the New York litigation, because that was
16 another one they challenged, any time now.

17 THE COURT: Okay. But the issue before me isn't that
18 there is a group claim in the alternative. This is a motion
19 for class certification. So if there isn't a class
20 certification in the Cellotechs bankruptcy what relevance does
21 it have? Because I don't see how I'm going to hear the
22 Debtor's arguments or yours, frankly, with respect to what
23 happened in Cellotechs if there isn't a class certification I
24 don't see what the relevance is.

25 MR. SPEIGHTS: Because one of the issues Your Honor

1 will face in class certification is whether you should handle
2 these claims en masse or not.

3 THE COURT: Yes.

4 MR. SPEIGHTS: And in Cellotechs, while it was a
5 group claim ultimately down there, they were handled with one
6 proof of claim on behalf of building owners within the
7 definition of the Anderson class. And they were handled en
8 masse that way, although they had have to particularized claim
9 information before the claims administrator, which was, I
10 think, a sensible way to handle a large number of claims, and I
11 will be making the same arguments with you in the certification
12 hearing in this case. Is it the best piece of ammunition we
13 have? No, Your Honor. Is it as -- a piece of the puzzle we'll
14 argue before you? Yes, Your Honor. And I just want to make
15 sure that I understand what information Grace has about
16 Cellotechs. They may no nothing. But if it has something I
17 want to be able to show that even Grace knows this.

18 THE COURT: Okay. I am having really some difficulty
19 understanding what relevance that has at all to the facts
20 before me. I don't see how either party's assertions are going
21 to be relevant. If the Debtor intends to make some argument
22 about what's happening in Cellotechs and you want to find out
23 what that's going to be because you want to make an argument
24 about what's happening in Cellotechs, then maybe I need a
25 Motion in Limine to see whether or not any argument should be

1 made about what's happening in Cellotechs, because I don't see
2 what relevance it has here. It may be the same Plaintiff,
3 Asbestos Property Damage Plaintiff, but it's different product.
4 Different Debtor. Different set of circumstances as to how the
5 Court now sits with respect to the proof of claims that have
6 been filed. I'm really having some trouble seeing how that
7 would even be admissible, by either of you, Mr. Speights.

8 MR. SPEIGHTS: Well, Your Honor, let me be perfectly
9 candid with the Court, as I hope I always am. Number four --
10 in the pecking order it's #4 is the reason I addressed it as
11 #4, and I appreciate that it might appear to be somewhat
12 attenuated from the issues before Your Honor. I'm not sure how
13 exactly that will play out at the certification hearing. And I
14 thought it appropriate to try to find out the basis of
15 Mr. Bernick's and Ms. Browdy's statements about Cellotechs
16 before going to that certification hearing. But I understand
17 if Your Honor's reluctant to do that. I would say the other
18 three go directly to this Grace bankruptcy, both the settlement
19 issue, both the U.S. Trustee issue and the issue of what Grace
20 has been saying about Anderson since 1992. And I would say if
21 we weighted them the other three certainly weigh heavier than
22 the Cellotechs issue.

23 THE COURT: Okay. Well, I'll hear from the Debtor,
24 but I'm having some difficulty understanding how any of the
25 Cellotechs matters are relevant. So if you're arguing that

1 they are and the Debtor argues that they are I don't know. I
2 guess I'll have to hear how they are, but I'm not seeing it too
3 easily.

4 MR. BERNICK: I won't prolong that agony, Your Honor.
5 On Cellotechs the only argument that's really been made is that
6 it's relevant to value. That's a matter for estimation. We
7 don't know that it really is relevant for that purpose, but
8 it's not relevant to Rule 23. There's not been any explication
9 of how Cellotechs proceeding goes to a specific element of Rule
10 23. None of it's been articulated here. Rule 23 is not simply
11 -- it's not even specifically a rule that says, gee, if you
12 want to have aggregate treatment you ought to have
13 certification under Rule 23. You can have aggregate treatment
14 in many ways under the rules, including by consolidation of
15 individual cases, rule 42. Otherwise that is not a specific
16 element of Rule 23, and therefore right now there's been no
17 articulated nexus between that discovery and satisfying the
18 requirements of Rule 23.

19 With respect to --

20 THE COURT: Wait, wait. Before you bypass that, so
21 the Debtor is not going to attempt to argue what the process
22 was, class certification process in Cellotechs in this case by
23 way of its challenge to a Rule 23 certification motion here?

24 MR. BERNICK: I don't -- I'm not aware of any motion
25 practice with respect to certifying a class or that there was a

1 certified class, or certified -- certification was denied in
2 Cellotechs, there may be a case out there. But I don't know of
3 anything that relates to that. Certainly I had no intention of
4 talking about how Mr. Speights's claims were handled at all in
5 the context of Cellotechs.

6 THE COURT: All right. If that's the case then I'm
7 going to deny the request with respect to the Cellotechs
8 certification if -- but I'm telling you now neither said is
9 going to argue to me what happened with respect to class
10 certification in Cellotechs.

11 MR. BERNICK: Okay.

12 THE COURT: Down the road if we need an issue about
13 value I'll determine that in a different context as to whether
14 it's relevant to that. But that's not where we are now.

15 MR. BERNICK: I don't know maybe -- I say, it may be
16 that there is a published decision with respect to
17 certification of a class in Cellotechs before the bankruptcy.

18 THE COURT: Well, that's different. If there's an
19 opinion that's a different issue. But I'm talking about the
20 process.

21 MR. BERNICK: I'm not -- I will stipulate, Your
22 Honor, we'll only be focused on there's an opinion. This
23 really is a matter of law in the decisions. Debtor's knowledge
24 of the efforts to exclude Anderson from the official property
25 -- Committee of Property Damage Creditors, again, nothing, zero

1 articulated by way of a nexus between those facts that are
2 sought in the requirements of Rule 23. It looks like that's
3 kind of an effort to say, well, gee, Grace didn't like my
4 participating on the Official Committee. Don't know that
5 that's so. But I also know, at least my understanding from all
6 the times that I've dealt with the U.S. Trustee's office with
7 respect to the appointment of committees, I have always
8 understood that it's all confidential. Now Your Honor's
9 smiling. It may be that it's --

10 THE COURT: It's confidential from the Court. I can
11 tell you that.

12 MR. BERNICK: Yeah. I think at least so far as my
13 experience goes is that one-way street. That is, you don't
14 find out really what anybody else is saying. U.S. Trustee asks
15 you questions and you respond to the questions. And if it were
16 otherwise, that is if we could conduct discovery into those
17 matters, I would imagine that the process of people
18 communicating with U.S. Trustee's office would be significantly
19 affected. And therefore not only is no articulation been made
20 of relevance, I think it's contrary to the policies, if not the
21 explicit rules of the U.S. Trustee in connection with the
22 appointment of committees.

23 The last one was the one that was mentioned here, it's a
24 very broad one, and I apologize for omitting it from our brief.
25 But it really is kind of a broader version of the request that

1 was made in item 1. The request in item 1 is kind of, this is
2 what we really want. That is, the communications regarding
3 prepetition efforts. Number two is kind of, well, give me
4 everything. And you know, maybe if I lose on that I'll get
5 item 1.

6 The give me everything is -- would again make a mockery
7 out of class action practice. What that says is that as soon
8 as I file a case for -- file a motion for class certification
9 I'm permitted as part of that process to say, well, I like to
10 have the company sit down through a knowledgeable
11 representative and tell us all of what they think about my
12 class action case. Because whatever it is that they're
13 discussing internally by all admissions so have all those
14 admissions. Well, class action practice has got no
15 relationship, no resemblance to that at all.

16 And what this is really a way of saying is, I want to get
17 into Grace's legal files and its legal personnel because
18 they're the only ones who are gonna know about the Anderson
19 class action with any degree of detail. It's gonna be in the
20 legal department. So let me go talk to the lawyers about what
21 the lawyers think of my class action request. That's not
22 proper class discovery. It's clearly -- I mean, to say that it
23 would violate all kinds of privileges in all kinds of discovery
24 rules that say the last thing you do is conduct discovery of
25 lawyers is to miss the huge problem that's the threshold

1 problem, which is this is improper discovery practice in
2 connection with any piece of practice unless it's for sanctions
3 or for something else that requires that you get into the
4 internal legal workings of a company. And to say that somehow
5 it's relevant to class certification is, I'm gonna prove my
6 class certification case by taking depositions of the company
7 lawyers and cross examining them with respect to whether the
8 elements of Rule 23 are satisfied, that, Your Honor, is just --
9 it is a laughable proposition. I'm pretty familiar with all
10 the revisions that have been done to Rule 23 over the last six
11 years, and the considerations thereof. I don't think I've ever
12 come across this kind of proposition. And this is certainly
13 not the case for it.

14 And that brings me to what I think is a point that we
15 really would have to make at this time. Your Honor has already
16 decided that the notice was adequate. If the notice was
17 adequate, that is the bar date notice was adequate, then all
18 people who could have comprised this class have come forward.
19 If that class notice were as Your Honor determined adequate all
20 the people who have comprised this class would have come
21 forward. So we now know who all the people are who would have
22 been participants in the class. Because they've come forward.
23 And those people with their claims have now been gone over, and
24 we know today. Even before we'd gotten to the substantive
25 issues. When we just talk about the preliminary issues of is

1 there a signature? Is there a building? Is the claim form
2 properly -- was there authority to file it? We now know that
3 there are only three Claimants left in this August purported
4 class. That's it.

5 And therefore the idea -- two things flow from it. One,
6 is that even if all of the other requirements of Rule 23 could
7 be in some fashion met, which they can't because there's no
8 longer numerosity just to begin with, we know that under
9 American reserve and the cases that have recognized class
10 certification as being possible in the bankruptcy context, the
11 medium requirements of Rule 23 are -- is only the beginning.
12 The Court then has to determine whether certifying a class
13 serves the purposes of the bankruptcy case. And Your Honor has
14 we know preliminarily but consistently over and over again said
15 why are we certifying a class when we know who these people are
16 and -- however many there are but we can handle it. So that's
17 really where we are.

18 So to go through all of this discovery motion practice,
19 more briefs, to prolong the agony for another day really kind
20 of ignores what's happened. Which is we had a proper notice,
21 we know who the Claimants are. Your Honor has already said
22 that it's not enough. We only have in fact three. And I would
23 venture to say that we have probably spent more time and money
24 litigating this purported class than probably all three of
25 those claims are worth in their totality. Because those three

1 claims have massive problems. Each and every one of them. And
2 even if they didn't, even if one was good or maybe two was good
3 or three is good, we're probably coming up to what those claims
4 are worth just in terms of this briefing.

5 Your Honor was very flexible and gave Mr. Speights the
6 opportunity to find out about the transcript in South Carolina.
7 That transcript will now come through. To somehow say that the
8 transcript of what happened in South Carolina really is only
9 part of it, we ought to find out what the lawyers at Grace were
10 thinking about South Carolina, Your Honor, I just think it is a
11 waste of the assets of the Estate. It does not further the
12 goals of this proceeding. Enough is enough. We just ought to
13 get on with that final hearing.

14 THE COURT: Okay. Part of this process has been the
15 fact that you've been winnowing down the property damage
16 claims. But I don't have, except for your assertion today, any
17 way of knowing whether the claims that are filed do -- are or
18 are not encompassed within this Anderson Memorial --

19 MR. BERNICK: We can certainly give Your Honor a very
20 short piece of paper that tells Your Honor exactly what claims
21 would have fallen within that class and how many of them are
22 left. I think our count was originally 26 and then it came
23 down to -- I think there's three left.

24 UNIDENTIFIED SPEAKER: In South Carolina.

25 MR. BERNICK: In South Carolina. Three claims.

1 THE COURT: Okay. Mr. Speights, if there are three
2 claims I'm not sure what we're doing here.

3 MR. SPEIGHTS: Well, two things on that, Your Honor.
4 I want to say, Mr. Bernick, there you go again. The Motion to
5 Certify is not limited to South Carolina to beginning with.
6 The Motion to Certify is a motion to recognize the South
7 Carolina class and to certify the entire class, which is far
8 more than three buildings.

9 Secondly, Your Honor, while you have come up to the edge
10 on frequent occasions as you just did, I am not sure what we're
11 doing Mr. Speights that there are only such and such claims,
12 and numerosity, you've been very careful going back to hearings
13 with Ms. Browdy in January and other hearings to say that you
14 have not ruled on that yet because that will come at
15 certification. And we want to argue that on certification, and
16 respectfully, Mr. Bernick's trying to jump into certification
17 now on an issue whether we can take several depositions. I
18 understand where he's going and I greatly understand and
19 appreciate Your Honor's concern on it. And at certification
20 I'm going to try to address that.

21 But I believe that -- I know that there are far more than
22 three claims in the universe of Anderson. And I believe that
23 when I argue to you on Anderson itself that you will listen
24 carefully to me on why there should be a certified class in
25 South Carolina, or the recognition of a class, which they have

1 characterized quite differently than the way I believe it
2 happened. And the record will show. So the short answer is on
3 the numerosity, which Your Honor has gone to since day one on
4 this matter, and that's why these deposition notices of last
5 December are being heard today. We went down there and Your
6 Honor said I couldn't have discovery behind the bar date. And
7 I understand that ruling, and I'm trying to just finish up the
8 rest of the issues. But bottom line is there's more than that.

9 Secondly, Your Honor, the issue is that Mr. Bernick raised
10 this time, not relevancy is in his papers, and not delay is in
11 his papers, but he raised attorney/client privilege. And now
12 that this notice where we simply want to ask the person most
13 knowledgeable about -- at Grace -- and actually, he didn't put
14 the notice up there. He put the request for production up
15 there. The notice is #1. The person most knowledgeable about
16 the Debtor's knowledge regarding the property damage claims and
17 class action proceedings brought the Anderson Memorial Hospital
18 through Speights & Runyan.

19 Now I would not be at all surprised, Your Honor, if the
20 documents relating to that, some of those documents -- in fact,
21 I would not be at all surprised if Grace claims all of those
22 documents, but certainly not surprised if it claims that some
23 of those documents are privileged. File a privilege log before
24 the deposition. That's the way it's done under the rules. I
25 just -- to make it a blanket assertion before the Court,

1 everything would be lawyers and everything would be privileged
2 is not sufficient in response to my request for deposition of
3 the person most knowledgeable.

4 I realize when I take the deposition that there may be
5 objections. I don't know if they're gonna produce a lawyer or
6 nonlawyer. And if it's in-house counsel there's all sorts of
7 arguments about privilege and in-house counsel. And who was
8 given a copy of the document? Did it just go to lawyers or
9 did it go to others? Et cetera, et cetera. Bottom line, Your
10 Honor, do you recognize when we're talking about the history of
11 Anderson, which we're now briefing on a separate rule, as Your
12 Honor recognized where Grace makes admissions against its
13 interest related to what we have to show to get class
14 certification we're entitled to discovery on that to be able to
15 show that it may lead to relevant evidence on that.

16 THE COURT: Well, you -- I think you're entitled to
17 do that. But that's why I want the 408 brief, because you're
18 only entitled to do it, I think, under 408 if it's somehow
19 discoverable other than through the settlement negotiations.
20 And if in fact the conduct has only come up because it's part
21 of the settlement discussions I don't think you are entitled to
22 it. But that's what I need a brief about.

23 MR. SPEIGHTS: But this is separate -- I understand
24 that some of what I want here, okay, which was separate and
25 apart from the other, some of what I want covered by here could

1 be construed as settlement discussion subject to that other
2 brief. But this goes far beyond that. This goes to -- from
3 December 1992 when the case was filed, certainly up an through
4 the certification hearing down below in September 2000. So
5 there's a whole history of Anderson separate and apart from any
6 settlement discussions. And I suspect, Your Honor, that
7 anything about settlement discussions is a minority interest in
8 those pieces of paper and of those discussions. So I would
9 like to go forward. Again, I'm ready next week to go forward
10 on the person most knowledgeable about Anderson and the
11 Anderson documents. I would request, Your Honor, that Grace be
12 required to furnish is privilege log before the deposition and
13 not after the deposition. I also will want to, you know, go
14 back again. And I'm not trying to delay the matters. I'm
15 trying to move it along.

16 THE COURT: Well, okay. I do agree that with respect
17 to an assertion of privilege that that is not something that
18 the Court can address in blank, that you do have to do a
19 privilege log. Mr. Bernick, if there's an assertion of
20 privilege it will have to be done by privilege log. The cases
21 are really clear.

22 MR. BERNICK: I would understand that, Your Honor.
23 But that -- I -- this is -- this issue here, this #1, by filing
24 -- the only difference between this and the part that would be
25 covered by Rule 408, the part that would be covered by Rule 408

1 deals with class. And as he has said that there are admissions
2 with respect to class as part of the discussion of class
3 settlement. The only issue before Your Honor is class. So the
4 two are -- the request -- the issue before Your Honor and 408
5 are all of one piece. All that 1 says is give me everything
6 else that you have with respect to Anderson Memorial. It's
7 like filing a case and saying, gee, why don't you produce the
8 30(b)(6) witness who can testify and give admissions about the
9 entire case? Now maybe that's the way it works in some Courts
10 by way of the first request, but by and large in a case you
11 have to make a specific discovery request. This says, give me
12 everything. Well, what does that encompass beyond what is
13 picked up by item 2? It's something that's not related to
14 classes. Give me everything you know about Anderson Memorial
15 that doesn't have to do with class certification. Well, it's
16 class certification that is the reason why we're here today.
17 We're --

18 THE COURT: So your contention is that the deposition
19 notice isn't specific enough to let -- to advise you what it is
20 that Mr. Speights is attempting to do.

21 MR. BERNICK: I am saying that by virtue of its lack
22 of specificity, but more importantly the only thing that it can
23 encompass that is different from 2, which is settlement
24 discussions about class, the only thing it can encompass are
25 matters that don't relate to class. That's the whole point is

1 that we're here at class certification. This is not all about
2 conducting discovery against the merits of the case that was
3 never certified. We're here to talk about class certification.

4 These class certification discussions are discussions that
5 if they took place took place in the context of settlement. So
6 they're not admissible. It wouldn't be admissible even if they
7 weren't in the context of settlement discussions. Let's be
8 concrete about this. Anderson Memorial case is filed. It
9 never gets certified as to Grace. These are facts we all know.
10 And they've now pursued the idea of class certification here.
11 The class that was on the table for consideration at the time
12 we filed was a South Carolina class. Okay. Now who is gonna
13 know about the Anderson Memorial case in so far as class
14 certification is concerned? Which is the only thing we're here
15 to talk about. It's lawyers. Nobody else at the company is
16 gonna have personal knowledge or be in a position the give
17 binding admissions with respect to the company on class
18 certification other than lawyers.

19 So effectively what #2 says is give me what the lawyers
20 discussed in the context of class certification for settlement
21 purposes, and presumably if #1 is relevant at all it says, give
22 me what the lawyers discussed about class certification not in
23 the context of settlement. Well of course, all of that coming
24 from a lawyer is going to be privileged. So --

25 THE COURT: Well, not everything that comes from a

1 lawyer is privileged. I mean --

2 MR. BERNICK: With regard to class certification?

3 THE COURT: Well, I don't know. It may depend, as
4 Mr. Speights said, on who all is involved in the discussions
5 and who has dissemination of the materials. Not everything --
6 just because you're lawyer doesn't mean that because you say
7 hello to someone that that fact is privileged.

8 MR. BERNICK: I understand that. But Your Honor, the
9 idea is that somehow only the person who can make an admission
10 that's a binding admission is somebody with knowledge.

11 THE COURT: Is an officer of the company.

12 MR. BERNICK: If you get to have an officer of the
13 company who has independent knowledge of class -- independent.
14 We got through the lawyer, it's a no go. So you have to have
15 independent knowledge and be able to --

16 THE COURT: So if there is no such person then you'll
17 have to put that in writing and say there is no such person.

18 MR. BERNICK: Okay, well we're happy to do that.
19 That is, we're happy to tell him if there's any person with
20 knowledge and authority regarding class certification other
21 than a lawyer.

22 THE COURT: Well, I don't -- that -- I don't think
23 that's what the deposition says. The deposition notice says he
24 wants a person most knowledgeable about the property damage
25 claims and the class action proceedings. Now the class action

1 proceedings portion of that you may be correct about -- to the
2 extent that that is a legal determination then you can file a
3 privilege log that says we claim the privilege and here's why.
4 To the extent that it's knowledge about property damage claims,
5 that may very well be a real estate person, not a lawyer.

6 MR. BERNICK: Sure. But it's not class
7 certification. That's the point. We're not here to talk about
8 the merits of the Anderson Memorial claim.

9 THE COURT: But it may be class certification because
10 it may affect the numerosity issue specifically.

11 THE COURT: But we've already been through
12 numerosity.

13 THE COURT: No, we've been through your version of
14 numerosity, which is that there are three claims. We haven't
15 been through Mr. Speights', which is that there are numerous --

16 MR. BERNICK: But Your Honor has already determined
17 -- Your Honor ruled last time and I believe the time before
18 that the purpose of this discovery is not to find out how many
19 more buildings there are out there.

20 THE COURT: That's right. There's no need.

21 MR. BERNICK: So numerosity --

22 THE COURT: There's a bar date.

23 MR. BERNICK: So numerosity -- if Your Honor's asking
24 for numerosity in so far as it relates to how many claims are
25 there, how many claims are there today? We can furnish that to

1 Your Honor -- to the Court, or we can do it by way of affidavit
2 and Your Honor can decide whether it's necessary to have the
3 deposition of a person to find out how many claims there are
4 with respect to the purported South Carolina class that remain
5 to date. I think there are three. But whatever they are we
6 can furnish that to Your Honor.

7 THE COURT: But that's -- for purposes of this
8 discussion I accept the proposition that as to the South
9 Carolina class there are three claims.

10 MR. BERNICK: Well, it's -- okay.

11 THE COURT: But Mr. Speights is not contending that
12 this class should be limited to the South Carolina certified --
13 certification process.

14 MR. BERNICK: I just -- I guess -- I won't get
15 frustrated. There was no other class that was pending as of
16 the time this case was filed.

17 THE COURT: That's right.

18 MR. BERNICK: So we're now saying we want to have a
19 certified class that was not prepetition, because that was
20 withdrawn, it was stricken prepetition. We want to have a
21 broader precertification class. I'm not aware of a single case
22 in our jurist prudence that says you for the first time have a
23 class proposed during a bankruptcy proceeding. Especially
24 against the backdrop where one was proposed and was much more
25 limited.

1 But even if you did, this is what's left. I mean, these
2 are all of the claims that remain pending. And again, we can
3 give you a certification from this chart here. This says that
4 there are a total of 180 Speights claims left in the United
5 States, and this would include Anderson Memorial. All of the
6 other folks are represented, are put forth, represented by
7 their lawyers so they don't need to be represented by Mr.
8 Speights or Anderson Memorial. So we have now a whopping 180
9 claims as to which you don't need class certification anyhow
10 because a) it's not numerous, and b) Mr. Speights is here and
11 see all the Claimants have come before the Court to participate
12 in these proceedings. So we're talking about an after-the-fact
13 class that now is gonna say, oh, we're going to ignore the fact
14 of all the people who are here and certify a class for a bunch
15 of people who never showed up. Your Honor's already rejected
16 that proposition in the context of dealing with the class
17 notice, which was adequate.

18 THE COURT: Right. I do not believe at this point
19 it's appropriate to look outside the proof of claims that were
20 filed -- proofs of claim that were filed because we had a bar
21 date that I found to be appropriate. So the universe of claims
22 is going to be the proofs of claim filed in the Court.

23 MR. BERNICK: Your Honor --

24 THE COURT: Okay.

25 MR. BERNICK: Your Honor, if you want attestation

1 about how many there are we'll give you that attestation. And
2 I think that we probably will not have a disagreement with Mr.
3 Speights on how many there are because we've been going through
4 it ad nauseam.

5 If we want -- if the purpose is to get class discovery you
6 have two parts of it. You have part 1 for settlement. And
7 part 2 is nonsettlement. That is if the purpose is to get
8 discovery out of the mouths of Grace witnesses that will be
9 relevant to Rule 23 elements because they are admissions.
10 That's the touch stone for discoverability, class discovery.
11 We have a place allegedly in connection with settlement, Your
12 Honor recognizes it's a 408 issue. So we then have, well, are
13 there people who can testify with knowledge and the authority
14 of the company and give admission with regard to Rule 23
15 elements not in a nonsettlement context. And I have observed
16 people who are gonna know about class, whether in settlement or
17 not in settlement, are gonna be the chief legal officer are the
18 people who are gonna be most knowledgeable.

19 Now if there's somebody who has independent knowledge,
20 independent knowledge and can give authoritative
21 representations with respect to the elements of Rule 23 beyond
22 numerosity, which we've just taken care of, who is not a legal
23 officer, I guess I try to think about who that is, but I don't
24 know of any such person. If Your Honor wants us to pin that
25 down, well we can pin that down. But thus far Mr. Speights has

1 not articulated any theory, any fact it would be known to a
2 nonlegal officer as to which that person would have the ability
3 to give binding admissions that would be relevant to Rule 23.
4 Which is what his burden is, particularly when we're dealing
5 with a threshold problem about numerosity.

6 So what is the fact? You can't find it anywhere. What is
7 the fact not subject to a claim of privilege, not subject to
8 Rule 408 that is relevant to class discovery?

9 MR. SPEIGHTS: I never argued so hard two depositions
10 or three depositions, Your Honor, but --

11 THE COURT: Well, you know, I think the point still
12 is, Mr. Speights, and you're right, I have been concerned about
13 the numerosity issue from the beginning, and I am still
14 concerned about the numerosity issue. But I had been under the
15 assumption that the issue was going to be whether or not there
16 should be recognition of the South Carolina class as the first
17 step, and then secondly I suppose whether since this is a
18 Bankruptcy Court as opposed to a South Carolina Court that
19 class can be broadened somehow to include other Claimants that
20 Anderson might be representative of in a class proof of claim,
21 as opposed to just looking at the South Carolina issues.

22 But if we're down to, seriously, 180 claims, if in fact
23 that's the case, I'm not sure where we're going, because I just
24 can't see where the numerosity issue is going to be satisfied,
25 even if all of the other elements of Rule 23 are met. I can't

1 see how that's going to provide a benefit to this Estate to
2 attempt to do that in a class method. And I guess -- I
3 understand I'm kind of leapfrogging past the certification
4 hearing, but that's what I am concerned about.

5 MR. SPEIGHTS: Well, Your Honor, I understand that.
6 I've understood that's been your concern since we were before
7 you in December and January. But respectfully, that's not
8 where we are today. I mean, I didn't come here to argue class
9 certification --

10 THE COURT: I understand that.

11 MR. SPEIGHTS: I have, I don't know how many boxes of
12 documents last time when Mr. Bernick put it on the calendar to
13 argue a number of points about all of the issues, including
14 that issue. But I do want to go back, and I understand you
15 always are gonna come back to that concern. But the
16 certification hearing, as I understand it, will be you will
17 probably turn to me, certainly Mr. Bernick will take the
18 position that I have the burden of proof in convincing you to
19 have class certification. And at that point I understand all
20 issues are on the table. Commonality, typicality, numerosity,
21 the affect on bankruptcy, everything. Your Honor has ruled --
22 all Your Honor has ruled at this point, while you've given me
23 some strong caution lights, is that we can't go behind your Bar
24 Date Order when we try to get discovery on that.

25 THE COURT: Right.

1 MR. SPEIGHTS: And I understand that. And so I'm
2 trying to wrap up my record presuming that Mr. Bernick is gonna
3 say I have the burden of proof. It's almost like I'm trying to
4 do some clean-up issues here that I think are important
5 because, #1, what Grace may have recognized behind the scenes
6 that it doesn't recognize in this -- in its pleadings on
7 certification, and to be able to use those at least as being
8 contrary to what Grace says.

9 And #2 is to correct the misstatements of the record. For
10 example, it has been less than 10 minutes when Mr. Bernick
11 said, and I wrote it down, [quote], "It never gets certified as
12 to Grace." And I think that's wrong. And I want to show it
13 not only by the record but by what Grace has said in its own
14 documents. And advised their own people. So we get to the
15 question of a person. It's great slight of hand to go up here
16 and say, "This is about certification, #2. And this is about
17 everything else." That's not what I'm saying. This is about
18 settlement. And this is about everything else. Settlement you
19 have decided you want additional briefing on. This is -- and
20 it is broad. They didn't object that it was overly broad. But
21 it is broad about everything Grace has about Anderson. So
22 somewhere in Boca Raton or somewhere, and perhaps in local
23 Counsel's office, they have two or three file drawers dealing
24 with Anderson. And that's the Anderson record that they have.
25 And they're going to claim a lot of that is privileged.

1 They'll file a privilege log. Okay. Then they've got to
2 produce a witness if Your Honor allows a deposition. You can't
3 keep somebody from testifying just because he's a lawyer or
4 she's a lawyer. You might not allow that person to answer
5 questions that are privileged. But if the person most
6 knowledgeable is a lawyer so be it. And I can't think of
7 anybody who would be more active in protecting privilege than
8 Kirkland & Ellis. So, you know, I'm gonna be right there, and
9 I'm gonna get about 1 out of 10 questions answered probably. I
10 understand that.

11 But it's important to me to go through that and see the
12 privilege log and see the documents they will produce to see
13 whether there are statements in there that could lead to the
14 discovery of admissible evidence or for documents which can be
15 used in my presentation on class certification. And I really
16 don't think that the issue of numerosity, while it's a big,
17 large issue floating around the Courtroom, should be dealt with
18 today on terms of discovery when Your Honor has, and I
19 appreciate it, said that that will be dealt with at the
20 certification hearing.

21 THE COURT: Yes, I said that repeatedly, so I guess
22 we're just going to have to go through the certification
23 hearing, because I'm not -- frankly at this point I'm just not
24 sure, maybe 180 claims is enough. Certainly there have been
25 classes certified with fewer so I -- if they can all be lumped

1 into Anderson -- and I don't know that they can by any means,
2 but if they can then maybe that's enough. Three, I have
3 significant doubts about. I'm not sure that there are any
4 cases that certify a class with three claims.

5 And if we're limited to that, I think that issue alone or
6 that fact alone will defeat class certification. However, I
7 don't know, you're correct. And I think you're entitled to
8 some discovery. I have been pushing this off. So I think you
9 need a date for the final proceeding so that we can get this
10 done once and for all in one context where all the issues come
11 up for adjudication.

12 Now, having said that, with respect to item #2, to the
13 extent that the request is for a person who has made some
14 statements during the settlement or compromise, I want the
15 brief on the 408 issue. I think Mr. Speights, you're going to
16 lose on this one because I don't think under the second
17 sentence in 408 that this will be relevant and admissible but I
18 don't know. I'll give you a chance to show me otherwise. With
19 respect to item 1, the request for a person who is most
20 knowledgeable regarding property damage claims in class action
21 proceedings, I'm still not sure what element it is that the
22 Debtor's knowledge of your claim is going to get you.

23 You're looking for some admission. That means it has to
24 be by a person with the authority to make an admission. All
25 right? This is a deposition notice, this isn't a document

1 production request, correct?

2 MR. SPEIGHTS: Well, it's both, Your Honor. And I'm
3 glad you asked that. I meant to make that point. It's a
4 deposition person of the most knowledgeable person and a
5 document production of documents relating to Anderson. We may
6 argue about whether the deponent -- the person produced makes
7 statements that are admissible or not admissible but he will
8 first of all lead us to documents. We'll have the documents
9 there. And the documents themselves may be admissions. Or for
10 a host of other reasons we may argue that something is
11 admissible out of that proceeding.

12 I don't -- I mean, right now, I'm trying to get the facts,
13 and the facts are -- I'm trying to get are what did Grace know
14 about Anderson or say about Anderson prior to our being here
15 and I mean, I'm -- I just think we don't need to cross the
16 bridge whether it's admissible or not. The documents
17 themselves we'll be offering and we'll deal with the admission
18 issue itself probably more likely than the person most
19 knowledgeable.

20 THE COURT: Okay. I -- this is why I'm having some
21 difficulty with this construct. Grace wouldn't know about a
22 class action proceeding, I would assume, until the class action
23 proceeding is filed.

24 MR. SPEIGHTS: Well --

25 THE COURT: You're asking back to December of 1992

1 when the action's filed.

2 MR. SPEIGHTS: It was filed as a class action
3 complaint.

4 THE COURT: Okay. Then as of December of 1992,
5 everything after that, isn't it going to be either subject to
6 some litigation privilege or some settlement privilege and
7 therefore covered by Rule 408?

8 MR. SPEIGHTS: Your Honor, I suggest to you
9 respectfully, there's no way to know that. I mean, they can
10 file the privilege log if you think that, but I can't imagine
11 everything even in their lawyer's file is privileged. I mean,
12 the lawyer, I mean -- I have my own files. You know, I can't
13 imagine everything that I put in there is privileged. But
14 we'll see.

15 But there may be things other than what's in the lawyer's
16 files. There may be an analysis by, you know, an accountant on
17 something. There may be an analysis by another type of expert.
18 There may be statements from one employee to the next, which
19 are not privileged. And that -- you know, privilege is really
20 seeking legal advice from a lawyer. That's a much narrower
21 subject than both Mr. Bernick and I representing other clients
22 sometimes try to make it to be.

23 THE COURT: All right. Well, I think that request,
24 to the extent it's a document request, is too broad. Asking
25 somebody to give them -- to give you everything they have

1 related to a topic, I think, is simply a fishing expedition.
2 And even the rules of discovery don't give you that much. I
3 think you need to narrow this topic.

4 With respect to a deposition of a person knowledgeable,
5 I'll ask the Debtor to identify a person. You can take your
6 deposition. And to the extent that you get a discovery request
7 in that is more limited in scope and the documents are claimed
8 to be privileged by the Debtor, then they'll have to produce a
9 privilege log in advance of the deposition if in fact that's
10 what they intend to do.

11 But that request, Mr. Speights, I think, is just overly
12 broad. It would require the Debtor to go through every
13 document in the Debtor -- in every file that the Debtor ever
14 had since 1992. And I don't think the discovery rules are --
15 require --

16 MR. SPEIGHTS: All right --

17 THE COURT: -- the Debtor to do that.

18 MR. SPEIGHTS: Your Honor, I understand that and
19 I'll do what Your Honor says but in fairness to myself --
20 sometimes I give myself a little fairness -- Grace never made
21 that objection from last December about over broad. It was on
22 relevancy grounds and on the grounds that it was intended for
23 delay. I'll be glad to do it. I just want to make it clear
24 that had Grace written me a letter saying overly broad in your
25 request and all, I would have worked in that behalf. I just

1 don't want to be the one -- we're about to go to scheduling --
2 to say well, Mr. Speights, you caused a delay because your
3 request is overly broad. I'll do that as quickly as I can and
4 get him a revised request.

5 THE COURT: None of this -- is this point is about
6 delaying, Mr. Speights. I've been holding this off because I
7 want to see what the resolution -- what the universe of
8 resolution is with respect to the property damage claims. The
9 Debtors just put up this chart that essentially shows that
10 there about 180 claims left that may fall into this universe.
11 I think if -- I mean, you may have some disagreement, I don't
12 know.

13 But I'll just assume for the moment that that's what the
14 documents will show with respect to the number of claims that
15 you have filed on behalf of your clients and Anderson that
16 would be included in the broadest scope of this request. And
17 if that is the case, then we know that number. So the number
18 isn't going to be the issue. Whether it meets the numerosity
19 is a different question. But at least we know the finite
20 number. And then there are some other claims there apparently
21 from other entities that were not represented by you but have
22 other Counsel involved.

23 So I think with respect to the discovery to the extent
24 that the request is as broad as it is, I can't even see how
25 it's calculated to lead to relevant admissible evidence because

1 it's too broad. So I think you need to narrow the scope,
2 whether the Debtor raised that issue or not. So how much time
3 do you want to recraft the document notice and the deposition
4 notice with respect to what was Point 1 on the board before?

5 MR. SPEIGHTS: One week, Your Honor.

6 MR. BERNICK: One week? Just so we're clear, Your
7 Honor, the issue is class discovery. He says I want to know
8 what Grace knew and said about Anderson. There is no
9 connection between these two that's apparent. It is our view
10 that the former question, that is what did Grace know, say
11 about Anderson is explicitly violative of Rule 23 and the
12 provisions for discovery associated with Rule 23. Has been
13 squarely rejected by the Supreme Court, which says you do not
14 litigate the merits -- class -- of the case before deciding --

15 THE COURT: But I --

16 MR. BERNICK: -- class certification.

17 THE COURT: -- don't think that's what the request
18 said. It said, knew about property damage claims and the
19 Anderson Memorial --

20 MR. BERNICK: What --

21 THE COURT: -- class action. But regardless, I've
22 said that it's too broad and it has to be recast.

23 MR. BERNICK: Well, but that's the point, Your
24 Honor, is that even today we have no articulation about
25 discovery that is specific to the elements of Rule 23. Like --

1 THE COURT: Well, he'll -- it'll have to be done in
2 the new deposition notice. Not the document production
3 request, but in the deposition notice.

4 MR. BERNICK: Maybe I just -- I think just the other
5 way around. I think it actually should be both, that is to
6 say, the documents are only discoverable to the extent that
7 they pertain to the elements of Rule 23 and we can only produce
8 a witness who is most knowledgeable concerning something about
9 which they are most knowledgeable. We need to know what it is.

10 THE COURT: Right. I agree with that.

11 MR. BERNICK: And so in both respects, we need to
12 know what specific element of Rule 23 we need to provide
13 documents about at -- person most knowledgeable. And I'm
14 fairly confident, Your Honor, that it will all be -- even if
15 it's non-settlement, it'll all be protectable by a privilege
16 because these are all matters handled within the legal
17 department.

18 The only reason I'm raising that, Your Honor, is it's kind
19 of -- it is damned if you do and damned if you don't. If it
20 goes beyond class discovery we will take the position and it'll
21 be all the way up position that we are not going to agree in
22 the context of class certification -- discovery. If, however,
23 it is class, we believe it's clearly going to be covered by a
24 privilege. So I don't want to mislead Your Honor into somehow
25 there is some room that we see to craft some narrow kind of

1 discovery.

2 We think that this is basically just an effort to go into
3 the lawyers' files in order to make up a claim for class
4 certification. And I am not aware of a single case in which
5 it's ever been done. And we would -- we'd probably spend the
6 time -- we've spent so much money on this already. We'll spend
7 the time looking to see whether this whole idea of looking to
8 the Defendant to supply the predicates for a class
9 certification through the lawyers' files has ever been done.

10 THE COURT: Well, okay. There are an awful lot of
11 assumptions that are being made that I'm not sure are valid or
12 invalid at this point in time. Mr. Speights, I want you to
13 recast the deposition notice and the discovery request, tying
14 the class of documents -- or the nature of the deposition
15 testimony you're looking to an element of Rule 23, so that when
16 I get an objection -- and Mr. Bernick, I want you to raise
17 every objection you intend to argue. I am not going to have
18 another proceeding like this where I hear objections to
19 relevance and delay but when I get here, I've got Rule 408 and
20 settlement issues and over breadth argued.

21 MR. BERNICK: Well, in fairness, Your Honor, we
22 objected to this. We objected to it in a timely fashion.

23 THE COURT: Yes.

24 MR. BERNICK: And we objected to the entirety of the
25 thing. And the whole -- our position fundamentally is not

1 changed, which is that all of this has got nothing to do with
2 class discovery. It's got everything to do with a bunch of
3 other issues that are not germane and we most certainly laid
4 opposition. Your Honor has now said you want to parse it
5 finer. That's fine, but we objected to what this is in
6 essence, which is an effort -- somehow that we're going to
7 prove up his class cert claim.

8 THE COURT: Well, I don't know what documents or
9 people are going to prove the certification claim, but
10 certainly he's entitled to find witnesses even if they're
11 witnesses who work for the Debtor if in fact he needs them to
12 prove that claim. And there is not as I know it a privilege
13 just because there's an employee of an opposite person who
14 prevents them from testifying as to an element of the case if
15 somebody can identify it. So, Mr. Speights, a week. Recast
16 it.

17 Mr. Bernick, whatever objections you're going to raise,
18 make them specific. I'm only going to hear arguments as to the
19 specific objections that are raised. And I want the 408
20 briefing on the same schedule. If this can come up at the
21 November Omnibus, that's fine.

22 Is there enough time to put it on the November Omnibus or
23 should I at this point simply give you a date for all class
24 certification issues including this? Do we need to get through
25 this discovery matter -- I guess we do -- need to get through

1 the discovery matter first?

2 MR. SPEIGHTS: Your Honor, first of all, I
3 understand your ruling. Secondly, as quickly -- I said a week,
4 I'll do it -- as quickly as we need to tee up the discovery
5 issues, let's do it. I want the record closed so we can argue
6 certification. I'm not trying to delay that. I have informed
7 Grace before that I want to present evidence, which I do not
8 think would be appropriate at the Omnibus hearing.

9 I'm ready to go as soon as Your Honor has some time to do
10 that after you rule on this. I would suggest, Your Honor,
11 between the November Omnibus and December whatever -- in
12 Pittsburgh when you have time to argue class certification
13 assuming we don't have any discovery blowups which I have to
14 come and -- I pray we don't -- come and say, Your Honor, we
15 have this thing and they won't give me the documents or
16 something of that nature. We can get this out of the way in
17 early December.

18 MR. BERNICK: Your Honor, I want to be realistic
19 here. I don't think that first of all, that Your Honor should
20 set a date for the class certification hearing because I don't
21 think this is going to be resolved. I think that we're going
22 to -- every time we go down this road we get the same thing
23 again and again, which is more and more discovery. I need this
24 that or the other -- I can predict to a 100% certainty that
25 when the requests come in they will fail as they've failed to

1 date to identify something in Rule 23 or if the -- at least
2 there will be an issue about that we'll have to get Your Honor
3 to resolve. So if Your Honor wants to go down this road, I
4 think that I -- we have got no choice. It's their motion.
5 Your Honor has allowed them discovery. We're going to have
6 litigation, I think, over the scope of this discovery what it's
7 going to be and we'll just take it in the ordinary course.

8 THE COURT: Okay.

9 MR. BERNICK: To hurry it up and set a date, I just
10 think is unrealistic at this point.

11 THE COURT: All right. The -- let's get it on to
12 November for the discovery issues. So that hopefully I can
13 give you rulings about this. Because truly, we need to get
14 this decision. And I have some serious concerns as to whether
15 or not the elements can be met as I've expressed on the record.
16 And I'm not in a position to make rulings about it at this
17 point in time. But I am concerned about it.

18 So I would like to get those concerns addressed one way or
19 the other, either to find that the elements have failed or to
20 find that they've been established, just so we can get past
21 this and get on with the claims litigation in this case. So
22 put it on for November -- whatever your briefing schedule is
23 that you need to do it. Get it on for the November hearing.

24 MR. SPEIGHTS: Thank you, Your Honor.

25 THE COURT: Now, I've said that -- isn't the

1 November -- I should point this out, maybe, just to be sure you
2 can meet this deadline. Okay, the November hearings are on the
3 20th. So that's a month. Is that still sufficient time?

4 MR. BERNICK: For this matter?

5 THE COURT: Yes.

6 MR. BERNICK: I -- it ought to be, but that's not to
7 say that it will be. I think it all depends on when we can get
8 from Mr. Speights the answers to the questions that Your Honor
9 has posed. And if he will tell us that, then I suppose we'll
10 find out when we should be responding to those requests, which
11 I assume will be by way of objection. And then I guess he
12 needs time to -- so we will move to -- for protective order to
13 quash again and then he'll have an answer to that.

14 So you got to have three things really between now and
15 November. There is the new discovery request, there is our
16 objection in motion and then I guess there is his response. I
17 mean, I think that's what the sequence should be.

18 MR. SPEIGHTS: Plus the 408 --

19 MR. BERNICK: Well, then the 408 -- well, let's get
20 this one done first because I'm sure that may end up driving
21 the date.

22 THE COURT: Well, why don't you do the 408 briefs at
23 the same time? Because I think --

24 MR. BERNICK: I understand --

25 THE COURT: -- that's still -- yes.

1 MR. BERNICK: -- that, but I'm saying -- yeah. The
2 408, but in terms of the schedule, I think the slow part of
3 it's going to be the objection part of it.

4 MR. SPEIGHTS: One week, one week, one week.

5 THE COURT: Okay. If -- I'm happy to do it in
6 November if you can. If you folks want it in December, I don't
7 care at this point in time. I think this case has got other
8 problems that are probably going to tie people up for a while
9 that you're working on anyway, but I would prefer to get it in
10 November simply so that hopefully we can get it done and I can
11 get you some rulings if you need an evidentiary hearing I'd try
12 to -- like to do that by the end of the year, but you know, the
13 longer we get into these dates and the more my calendar fills
14 up, the less likely that's going to be. So --

15 MR. BERNICK: I'll tell you what, Your Honor. If we
16 get the discovery questions in one week, we will file
17 objections within one week and Mr. Speights can then have one
18 brief in response in one week. And I suppose that we ought to
19 have an exchange briefs but -- or it may be at -- on the second
20 date, which is the date for our responding to their discovery
21 we will also submit a Rule 408 brief and they then can have
22 that last date to get their briefs. Got three dates. One week
23 for the discovery requests, new discovery requests. Now, I'm
24 assuming, Your Honor, that we're not talking about new
25 discovery requests on new matters. They are simply --

1 THE COURT: No.

2 MR. BERNICK: -- a refinement --

3 THE COURT: Refining. Only refining.

4 MR. BERNICK: Yeah.

5 THE COURT: This item. Yes.

6 MR. BERNICK: Okay. And that's a week. Then the
7 following week we will submit our 408 brief and a Motion to
8 Quash any new discovery that we believe is inappropriate. And
9 then the third week -- I don't know what these dates are --

10 THE COURT: I'll give you the dates.

11 MR. BERNICK: Yeah, I guess it's the 30th. The 6th
12 would be for our responsive brief and our 408 brief and then on
13 the 13th, which would be the last week, Mr. Speights on behalf
14 of his clients can file a response to our motion for protection
15 and response to our 408 brief.

16 MR. SPEIGHTS: I don't want to be picky, Your Honor,
17 but I probably won't be the one who's doing the 408 brief. No
18 problem on the depositions, one week, one week, one week.
19 Seems to be on 408, they've got a brief, I've got a brief.
20 Just split the time in half for that, otherwise they're going
21 to have two weeks to do a 408 brief and I'm going to have one
22 week to do a response.

23 THE COURT: Okay. It's all going to come to me at
24 the same time, so I don't --

25 MR. SPEIGHTS: I understand, Your Honor, but I mean,

1 it's -- the 408's the big issue and there's no reason they
2 can't be working on that now and I -- all I said when we argued
3 it a while ago was, just give me the same amount of time.

4 THE COURT: All right. The Debtor -- your -- the --
5 why do I need reply briefs on the 408? Why can't you both
6 submit them at the same time?

7 MR. BERNICK: We could do that too.

8 MR. SPEIGHTS: That's fine, Your Honor.

9 THE COURT: I mean, the law's going to be the law on
10 408, isn't it?

11 MR. SPEIGHTS: Yes, Your Honor.

12 THE COURT: So, fine. Everybody's 408 brief can be
13 submitted by November 13th. That's not going to make my final
14 binders and give me the weekend to review these. Well, okay.
15 I'll have the following weekend. No, I won't. I need
16 everyone's 408 briefs in the final binders, and since you've --
17 both going to submit them together -- I'm sorry, Mr. O'Neill,
18 when are the binders? The 10th?

19 MR. O'NEILL: The final agenda, Your Honor, is due
20 on the 13th.

21 THE COURT: Okay. So you need the briefs by at
22 least the 10th so that I can get them -- actually, is there any
23 possibility of getting the binders on the 10th instead of the
24 13th?

25 MR. O'NEILL: Sure. Well, the preliminary binder

1 will have already gone out --

2 THE COURT: Oh, that's right.

3 MR. O'NEILL: So that none of these things would be
4 included.

5 THE COURT: That's right. That's right. So --

6 MR. O'NEILL: And so we can email the briefs with
7 the -- we can email the briefs to -- on the 13th or on the
8 10th --

9 THE COURT: 10th -- that would --

10 MR. O'NEILL: -- if that works better.

11 THE COURT: -- be fine. Yes. You're correct. The
12 preliminaries will be there. I'd forgotten. All right. So
13 all the 408 briefs are due on November 10th. So let me correct
14 this. All right, so the dates. Mr. Speights, your new
15 discovery documents due -- or notice is due October 30. The
16 Debtor's responses, objections, whatever -- November 6th. Your
17 response if they file an objection by November 13 and the
18 argument on November 20. With respect to the 408 briefs,
19 everybody's are due November 10th and they'll be argued on
20 November 20. Okay. All right, that's item 7.

21 MR. BERNICK: That is which one, I'm sorry, Your
22 Honor?

23 THE COURT: 7, I think. For the Motion for
24 Protective Order?

25 MR. BERNICK: Yes, that's item 7. 8 was the

1 transcript matter, and that's, I think, already been reported
2 to the Court. And then the 9th -- item 9 was a date for class
3 certification, which sounds to me like we ought to simply hold
4 in abeyance until Your Honor can determine where we're at next
5 time.

6 THE COURT: Yes, I'm not sure I can do much on item
7 9 until we get past the discovery and hopefully the transcript
8 issue, if I'm going to get it, will be addressed by then. Mr.
9 Speights, can we just take that issue up for a scheduling order
10 at the next hearing?

11 MR. SPEIGHTS: Yes, Your Honor.

12 THE COURT: All right.

13 MR. BERNICK: I think that just leaves us, Your
14 Honor, with item 10. Finally give Mr. Finch here something to
15 do. This is just a status report with respect to the personal
16 injury claims. And I think that there are probably three
17 matters, if Your Honor will give me just a moment here.

18 Okay. There are three matters. One is the status of the
19 questionnaires. The second is to make a report concerning X-
20 rays and then the third is to let Your Honor know where things
21 stand with respect to the settled claims.

22 So on the questionnaires, as Your Honor probably doesn't
23 recall at this point, we do have a due date for any
24 supplementation to the questionnaires of November the 12th.
25 We, as pursuant to discussions we've had with Your Honor before

1 in Court, have both written and discussed over the telephone
2 the question of what the extent of the supplementation is going
3 to be, and more specifically, whether people are going to
4 continue to not only object, but on the basis of those
5 objections, not answer questions.

6 And then the related issue of how much time they need in
7 order to complete their responses. And the two are very
8 closely tied together, because if we are simply going to get
9 the questionnaires, but without really any substantial
10 supplementation with a lot of gaps, then it doesn't make too
11 much sense to have an awful lot more time for that process
12 because we're not going to get a complete answer anyhow.

13 Whereas if people would give us a complete answer then
14 we'd be much more -- it'd be much more livable to have an
15 extension of time because we know that once the answers come
16 in, they're going to be complete and the data can be put into
17 the system. Thus far we've -- I think -- contacted absolutely
18 everybody and I won't go into the gory details of the scope of
19 that effort. Nobody has said that -- has committed that they
20 will answer all the questions. And nobody has given us a
21 definitive list of what they're still going to be objecting to.

22 They all pretty much say, you have to wait for our
23 supplementation, but by the way we want a very -- you know, a
24 significant supplementation. Usually between 30 and 60 days or
25 additional time -- usually between 30 and 60 days more time

1 beyond the time that Your Honor already has given. So
2 effectively what we're approaching on November the 12th is that
3 we will find only then what people are not going to answer and
4 at that time, Your Honor's going to have to address those
5 matters.

6 Our approach right now is that -- remains the same, that
7 unless people really are going to give us complete answers,
8 that is they're going to answer the questions -- they may
9 object, but they'll answer the questions, we don't see a
10 purpose to prolonging the time period for their supplying
11 answers. That dialog still continues, we are still totally
12 open to people.

13 And there's one law firm in fact who has made very
14 substantial progress in deciding that they're going to give us
15 answers. And there are very few questions that they're not
16 answering. And with respect to them, we're very flexible on
17 time. So I think I really can't say much more than this is
18 still in process. I can tell Your Honor what the objections
19 are that I think we're headed for.

20 MR. FINCH: Your Honor, I don't really understand
21 the purpose of this. I mean, if Mr. Bernick has Motions to
22 Compel, he can file his Motions to Compel, giving the Court
23 preview about what Motions to Compel he might file later on
24 down the road. I think it's inappropriate, particularly since
25 the law firms who are responding to these questionnaires don't

1 have Counsel.

2 MR. BERNICK: Yeah, I'm not going to -- with due
3 respect, Your Honor, we're giving you a status report on the
4 matters that affect the schedule. And the problem with
5 bringing the Motion to Compel is that -- and I'm happy that Mr.
6 Finch raised it -- the problem with bringing the Motion to
7 Compel is that there has been -- and I won't say an intentional
8 -- but a very consistent pattern whereby people don't want to
9 commit to what their positions are as a result -- with the
10 result that we can't tee them up for decision by Your Honor.
11 And it's cost us an incredible amount of time.

12 But we have read through the questionnaires. And on the
13 basis of our discussions, it appears that the objections that
14 will remain are the ones that I've listed here -- attorney-
15 client privilege, work product confidentiality burden and then
16 I guess it's a privacy issue.

17 Our current intention is to try to file some Motions to
18 Compel right away, anticipating that these issues will in fact
19 survive at least with respect to certain firms and that we'll
20 know that by November the 12th. So what we'd like to do is
21 file the motions, then perhaps get a special hearing set if
22 that's at all possible just to deal with these issues on a
23 Motion to Compel at some time before the December Omnibus
24 because we really do need Your Honor's determinations on these
25 matters.

1 And I think that the issues have been very significantly
2 refined at this point as a result of all that Your Honor has
3 said. So effectively, the time frame that we're working with
4 is November the 12th for supplementation. We will have a
5 Motion to Compel pending by that time. If people -- we hope to
6 be able to report also by November 12 our efforts to reach
7 agreement with folks. And maybe they'll have more definitude
8 on what they're objecting to by that time, on what they really
9 need by way of more time if any.

10 But I think our basic approach is going to be that 30
11 days, 45 days is pretty much all that the schedule at this
12 point will tolerate. I will add that by this time also the
13 Proof of Claim date is November 15th. So by that time folks
14 will have had to make the decision about whether in fact
15 they're going to pursue a claim in this case.

16 Now, it may be that as Mr. Innselbuck explained at one
17 point, people will have no choice because they feel that as a
18 matter of making sure that they don't breach an obligation to
19 their client -- no choice but to file a Proof of Claim. It may
20 be not. But certainly anybody who does file a Proof of Claim
21 at that point then there -- I mean, there's no reason why the
22 questionnaires can't be completed for those people who are in
23 fact going to be preserving their rights in this case.

24 So that's where we are in the questionnaires. It's -- you
25 know, we're making progress but it's difficult to say how much

1 because nobody's really told us whether there's going to be any
2 significant change over where we were before. Whereas Your
3 Honor knows there were huge numbers of questionnaires that were
4 really not filled out at all and these objections that were
5 being made to thousands and thousands of claims. And maybe
6 that nothing's changed. I just don't know.

7 THE COURT: Okay.

8 MR. BERNICK: With respect to the X-rays, the
9 questionnaire does call for people to turn over X-rays. We
10 know that that's a process that requires some work and
11 therefore we have started by only asking for X-rays for people
12 who are making claims for lung cancer or other cancers.

13 We're not asking for X-rays at this time with respect to
14 people who have mesothelioma claims. We're not asking for X-
15 rays at this time with respect to people who have non-malignant
16 claims, although that time will come. We may well go for a
17 sampling kind of approach there. We're just not quite sure.

18 But we have asked for the X-rays for people who have --
19 who actually have lung cancer or other cancers -- it's driven
20 by the question of whether those cancers are asbestos-related
21 or not. And I think we've told Your Honor before that based
22 upon the data that we have from the questionnaires, the
23 statistics are pretty significant. Based on the questionnaire
24 information, 30% of the doctors who have performed the B
25 reading in connection with lung cancer are either known or

1 suspected of using non-standard diagnostic practices. And Your
2 Honor's familiar with those doctors and that whole issue.

3 But we could be talking about 30% and more of the
4 questionnaires that have been submitted so far. With respect
5 to other cancers, the number gets up to 51%. Our approach is
6 going to be to ask that the X-rays be turned over within 30
7 days. We will then submit them to three independent B readers
8 -- that is, the same X-ray will be read three different times
9 by an independent B reader, which we believe is necessary in
10 order to gather data that's replicable data. And we'll see
11 what comes out of that. But that's our process. That's what
12 we're going for there.

13 With respect to the settled claims, there's actually a
14 partially good news story there. Your Honor will recall the
15 concern that we had about the settled claims, which is the
16 people -- there was a significant number or a significant
17 number of claimants who did not submit questionnaires at all.
18 And we were concerned that the reason that they weren't
19 submitting the questionnaires is that there was some position
20 that the claim had been settled whereas in fact it had not been
21 settled. And we didn't know how much that accounted for.

22 We do have records of our own, indicating that there are a
23 significant number of settlements that we recognize as being
24 settlements. I will tell Your Honor that our database reflects
25 approximately 21,000 claims that we believe in fact have been

1 settled. The estimate -- the deadline for people to submit
2 their Proof of Claim forms if they have a -- if they assert a
3 settled claim -- that deadline was October the 16th.

4 And our current estimate is that there are maybe as many
5 as 35,000 Proof of Claims for settled claims that have been
6 submitted which would -- assuming that all 21,000 of the ones
7 that we think are settled submitted a Proof of Claim, which
8 means that you have a delta of approximately 15,000 claims.
9 Now that's not great but it could be much worse. Two major
10 problems that we think are going to be amenable to a very
11 prompt resolution in December -- 1 is that we have people who
12 assert that they have a settled claim and there is no
13 documentation at all that's attached. And #2 is that there are
14 a number of settlements where -- ledge settlements where a
15 release has been produced but we have no indication of whether
16 that release actually was given to Grace as of the time that
17 the case had been -- the Chapter 11 had been filed.

18 Now, I'll tell Your Honor that that very issue was
19 addressed in connection with the Babcock and Wilcox bankruptcy
20 case. And the standard that was articulated there was that
21 there had to be evidence that the release in fact was sent,
22 that it had left the control of the claimant as of the time the
23 case was filed. Otherwise there could not be mutuality -- that
24 is, if the claimant still had the ability not to send it
25 through then the claimant's not bound and therefore there can't

1 be a contract. And that was the test that was adopted there.

2 But we need to do further homework to understand what the
3 source of this disagreement is in those cases. But in any
4 event, I think that that matter is pretty much on track, as
5 we'll be able to tee up these issues. We have to send out
6 letters within two weeks, which is going to be a push. But we
7 think we can do it. Telling basically people whether we agreed
8 that their claims are settled or not. And then the outstanding
9 matters can be taken up and we can roll the people who don't
10 have settled claims into the questionnaire process.

11 THE COURT: Mr. Finch?

12 MR. FINCH: Nathan Finch for the Asbestos Claimants
13 Committee, Your Honor. Before I respond to the points Mr.
14 Bernick raised, there is an issue that the Asbestos Claimants
15 and the Future Claimants representative would like to tee up by
16 a Motion to Compel -- probably along the same time frame as the
17 Debtors on their Motion to Compel with the claimants.

18 I'm not suggesting that we do it on necessarily the same
19 day, but there's an impasse between us on the question of
20 whether Grace has waived the attorney-client privilege with
21 respect to settlement communications with asbestos personal
22 injury claimants pre-petition. We think that they have, based
23 on statements they made in Court, based on briefs that they've
24 filed.

25 The Debtor respectfully disagrees with that position. I

1 think it's fair to say that neither one of us would have our
2 minds changed by going through a mediation session with the
3 mediator -- the discovery mediator --

4 THE COURT: Wait. I missed the point. The --
5 whether the Debtor waived the attorney-client privilege as to
6 what?

7 MR. FINCH: As to the reasons that it settled pre-
8 petition asbestos personal injury claims. And --

9 MR. BERNICK: Oh.

10 THE COURT: As to the reasons why it settled.

11 MR. FINCH: Correct.

12 MR. BERNICK: You're talking about -- just to be
13 clear, there's been some discussion on certain Sealed Air
14 documents. As I understand it, these are requests that ask for
15 Grace to disclose -- presumably from its lawyers' files,
16 because that's where it would be -- the reasons why Grace
17 settled individual claims prior to the Chapter 11.

18 MR. FINCH: Yes, we think they've waived the
19 attorney-client privilege with respect to those types of
20 discussions, for several reasons. I can argue the motion now.
21 I prefer -- I don't think Mr. --

22 THE COURT: But why do you care? I'm sorry, why do
23 you care?

24 MR. FINCH: Because Grace has come into this Court
25 and said that you should disregard our past settlement history

1 as not reflective of our liability because we settled tens of
2 thousands of cases that had absolutely no merit at all that
3 were -- and they're going to ask you to heavily discount their
4 past history because they're asserting that those claims are
5 {quote} "meritless" or lack merit.

6 Leaving aside the question of whether -- how you can
7 determine whether a claim is meritless without taking it all
8 the way to a jury or not, the point is that we believe there
9 are documents that their lawyers have that show that they knew
10 very well they were settling claims to basically buy off the
11 risk of liability. And that the cost -- the estimate of the
12 cost it would -- Grace would incur to settle the pending and
13 future claims, resolve the future and pending claims -- best
14 evidence of that is the dollars they paid in the past.

15 And so it's their contention that you should ignore all
16 the past settlement history and that it's irrelevant. And we
17 think there are very damaging admissions in their files from
18 what their lawyers were really telling them about the claims.
19 And therefore we think that they have waived the attorney-
20 client privilege by coming into Court and saying we settled
21 cases for X reason and that therefore by saying the reason that
22 they settled the case is we're entitled to discovery of that.
23 They said they settled cases for -- you know, for reasons that
24 -- well, we had too many cases to deal with. Our lawyers
25 weren't competent and couldn't defend us. We had too -- far

1 too many cases on our docket to evaluate them all. And
2 there --

3 THE COURT: Where have they made these statements?

4 MR. FINCH: In the informational brief, among other
5 places.

6 THE COURT: Oh.

7 MR. FINCH: In presentations that Mr. Bernick has
8 made in Court where he's quoted the testimony of Jay Hughes,
9 whose deposition I took in the Sealed Air case. Some of these
10 types of documents were produced in the Sealed Air case --
11 they're -- they have been turned over to the United States
12 Government pursuant to a subpoena. They're no longer
13 privileged as against the world.

14 So we have a variety of arguments why this type of
15 discovery is a, both necessary, and b, not barred by the
16 attorney-client privilege or the work product doctrine. What I
17 would like to do is to file the Motion to Compel, have Grace
18 respond to it, have a hearing -- have an argument on that.

19 If the Court rules in Grace's favor, then we'll decide
20 whether we appeal that or not. But there won't be anything for
21 the discovery mediator to do. If on the other hand the Court
22 rules in my favor, then it may well be that there would be
23 burden issues and timing issues related to the production of
24 that material and that's when the mediator could be of some
25 assistance. But what I'm suggesting is that we tee up the --

1 THE COURT: But --

2 MR. FINCH: -- legal issue first.

3 THE COURT: Okay. But isn't the legal issue that
4 I'm going to face whether or not to give credence to Grace's
5 assertion that I should ignore the pre-petition settlement
6 history and Grace's expert, I -- I'm assuming that Grace's
7 expert's going to adopt that position. I don't know that for a
8 fact. But on the assumption that Grace's expert's going to
9 take that position, first it's the experts from the other sides
10 who are going to say, this is relevant because it's the best
11 evidence of what Grace's actual -- felt it's actual liability
12 for the cases was. What difference does the reason make?
13 Isn't it the fact that Grace settled --

14 MR. FINCH: It's an admission by Grace. It's --
15 Grace is --

16 THE COURT: But they settled.

17 MR. FINCH: -- coming -- but Grace --

18 THE COURT: I mean, of course --

19 MR. FINCH: Grace is coming into Court saying these
20 cases have -- we settled these cases because they -- because of
21 specific reasons. We're entitled to attest those assertions in
22 discovery. We're entitled to put on our own evidence where
23 their lawyers and their General Counsel said we settled these
24 cases for the same reason you would settle an accident case.
25 There was a potential liability there. We settled cases where

1 we thought they could get past Motions for Summary Judgment and
2 we took the cases to trial where we thought we had a good
3 chance of winning.

4 That's their strategy. They've come in and said things --
5 that that's the strategy that their lawyers pre-petition wrote
6 in documents to their auditors. They're coming in here saying,
7 no, no, no, Your Honor. You've got to ignore all that. We
8 settled cases because there were 100,000 of them. We couldn't
9 defend them all. Once they say the reasons why they did what
10 they did, they put into issue whatever advice they got from
11 their lawyers about the reasons why they did what they did.

12 THE COURT: Okay, but so far I haven't had an
13 evidentiary hearing and you're making the assumption that I'm
14 going to let them tell me why they settled cases. And I think
15 Rule 408 that we just spent a lot of time going through isn't
16 going to let them tell me why they settled the cases.

17 MR. FINCH: Well, one of their arguments is that the
18 settlement had -- the Rule 408 issue has been teed up in the
19 exact same context in an asbestos case and Grace lost. It was
20 in the Babcock and Wilcox case, Your Honor. And one of the
21 arguments they make is that prior settlement history is
22 inadmissible for the purposes of proving up the -- please sit
23 down, Mr. -- Your Honor -- Mr. Bernick.

24 THE COURT: Pardon me.

25 MR. FINCH: May I --

1 THE COURT: You will address me, not Mr. Bernick.

2 MR. FINCH: Your Honor --

3 THE COURT: I've told you folks and I mean it. The
4 next time, bring your toothbrushes. We're not going to do this
5 in this case anymore, folks.

6 MR. FINCH: May I continue until I'm finished and
7 then I'd like to cede the podium to Mr. Mullady.

8 THE COURT: You may finish. You may finish. And
9 then I'll determine who goes next. Go ahead.

10 MR. FINCH: The point, Your Honor, is that the -- we
11 believe the settlement history is admissible to prove what is
12 Grace's liability for pending and future asbestos personal
13 injury claims.

14 THE COURT: The settlement history may be, but you
15 know the settlement history. What difference do the reasons
16 make and how are you going to get them into evidence? How is
17 the Debtor going to get them into evidence

18 MR. FINCH: The Debtor has said that you should
19 ignore the settlement history. They're going to put on
20 evidence -- they -- this is discovery, remember?

21 THE COURT: Wait, wait. No. Discovery has to be
22 calculated to lead to relevant and admissible evidence. What
23 the Debtor has said in its discussions arguing against whether
24 or not there should be the type of evidentiary hearing that it
25 wants versus what the Creditors Committee wants isn't evidence.

1 It's just their argument about why I should hear a particular
2 line of strategy.

3 MR. FINCH: But they're --

4 THE COURT: I've already said that Grace is going to
5 try its case Grace's way. And you're going to try your case
6 your way. And if the two don't meet, the job that the Court
7 has is to try to reconcile the evidence where I can. And where
8 I can't, to determine who I believe and credit and to give the
9 weight to those appropriate entities. If you can't get -- if
10 the Debtor can't get into the reasons for the settlement, and I
11 don't think the Debtor can get into the reasons for the pre-
12 petition settlements, because they were settlements, what
13 difference does it make to the committee? It's the fact that
14 the Debtor settled X number of cases for X dollars that you
15 care about, isn't it?

16 MR. FINCH: Because they have said what they're
17 going to put on evidence from both fact witnesses and experts
18 that will say that you should ignore the past settlement
19 history because they say that they settled cases -- various
20 categories of cases they now say are valueless. They say you
21 should give no value to these types of cases. We are entitled
22 to show that the -- that they settled those cases because they
23 did think they had some value. They thought --

24 THE COURT: Well, obviously --

25 MR. FINCH: -- they had some exposure.

1 THE COURT: -- they thought they had some value, at
2 least nuisance value if nothing else, because they settled the
3 case. Otherwise if they thought there was absolutely no
4 possible exposure, they'd take it to the mats unless in their
5 business judgment they decide that it costs them less to
6 settle. What difference does it make why they settled? The
7 fact is they settled.

8 MR. FINCH: Your Honor --

9 THE COURT: People settle for reasons --

10 MR. FINCH: I --

11 THE COURT: -- that are wholly different from their
12 litigation modes.

13 MR. FINCH: But the -- if what we're estimating is
14 the cost to resolve the pending and future claims --

15 THE COURT: Yes.

16 MR. FINCH: Our argument is that the best evidence
17 of that is based on what they paid in the past. They're saying
18 they're going to put on evidence to ask you to disregard that.

19 THE COURT: Well, I don't know how I'm going to
20 disregard it. It's a fact that happened in the past. That's
21 what they paid to settle cases.

22 MR. FINCH: They've asked you to either disregard
23 and/or heavily discount that. They're going to put on fact and
24 expert testimony that they say will prove that their method of
25 estimation is better. I think they can't get even any kind of

1 admissible evidence before the Court as to how they're going to
2 do this, but I got to be able to cross examine their General
3 Counsel if he gets on the stand and their -- Jay Hughes, the
4 director of asbestos personal injury litigation. I think I
5 know what he's likely to say. He's likely to say what he said
6 in the Sealed Air case, which is, we had too many cases to deal
7 with.

8 I think that's undercut by a lot of other documents in
9 Grace's files, some of which I've seen. Some of which I
10 haven't gotten access to yet. I'm entitled to do that
11 discovery. And to the extent that Grace in its responses to my
12 outstanding document requests, has raised the attorney-client
13 privilege and the work product doctrine as a reason to withhold
14 that discovery, I'm entitled to file a Motion to Compel,
15 because I think this is -- it is evidence that is relevant to
16 a claim or defense of a party. It's their defense, in effect.
17 They're saying you should ignore all this fact that we paid \$1
18 billion in the past to resolve asbestos cases --

19 THE COURT: Okay.

20 MR. FINCH: -- because we have all these reasons why
21 we did it.

22 THE COURT: Well, you could --

23 MR. FINCH: Well, but once they start getting into
24 the reasons why they did it, I got to be able to --

25 THE COURT: You can certainly file a Motion to

1 Compel. And the Debtor can certainly respond to it. If what
2 the Debtor's response is going to be is that they're going to
3 produce evidence that says that I should value the claims that
4 they settled at 0, then I agree. You're entitled to find out
5 why they're valuing those claims at 0. Because they clearly
6 have a settlement value, if nothing else. They settled.

7 MR. FINCH: Well, they're clearly going to be
8 valuing lots of cases that they think are {quote} "meritless"
9 at 0 in the estimation process, or at some diminimous value
10 that's far lower than what the historical values are.

11 THE COURT: Well --

12 MR. FINCH: I mean, they've already said that.

13 THE COURT: But what I understood --

14 MR. FINCH: I don't know for sure that they're going
15 to say it until I get their expert reports in December or
16 January.

17 THE COURT: I understand. But what I understood
18 their -- the Debtor's position to be is that the reason we're
19 going through the questionnaire process and looking for the X-
20 rays and the B readers and the other evidence of what the
21 current claims are is so that the Debtor's expert can take a
22 look at the current claims that are before the Court and say,
23 based on this evidence, these claims are valued at 0. Not that
24 the Debtor's settled claims in the past were valued at 0.

25 MR. FINCH: But who is -- the point is, though, Your

1 Honor --

2 THE COURT: Or some number. I'm using 0.

3 MR. FINCH: It's part of rebutting their expert,
4 saying these claims are worthless. Their expert will say lung
5 cancer without an underlying radiologic diagnosis of asbestosis
6 is not asbestos-related lung cancer. There's a --

7 THE COURT: And your expert will say otherwise.

8 MR. FINCH: Yes, but in the -- and -- but Grace paid
9 those cases in the past and their expert is saying, oh, those
10 cases have no value now. I'm entitled to put on evidence that
11 Grace thought those cases -- not only that they paid them in
12 the past but they thought that they had value because if they
13 took them to juries, they could get hammered for \$1 million or
14 \$2 million or \$10 million.

15 THE COURT: I don't know how you're going to get
16 into the scope of settlement discussions and why Grace settled.
17 I don't know how the Debtor's going to get into it.

18 MR. FINCH: Because, Your Honor, the -- Rule 408
19 would only preclude discovery into settlement negotiations
20 between me and Mr. Bernick as to whether Grace's asbestos PI
21 liability is \$1« billion or \$2« billion or \$5 billion. That's
22 the claim at issue in this case. The discussions they had with
23 other people on the merits of individual personal injury cases
24 is not the claim that we're trying in this Courtroom.

25 THE COURT: That doesn't matter. It's still

1 settled. This -- the Rule 408 doesn't apply to just the
2 settlement that you want to undertake. It applies to all
3 settlements. You cannot admit evidence of the conduct or the
4 negotiations of a settlement discussion and the -- and I think
5 there's good reason for it. We've all settled cases. We all
6 know why we settle cases. We settle cases because we don't
7 want to go to trial.

8 MR. FINCH: Your Honor --

9 THE COURT: And if we have to go to trial, our
10 litigation posture and position is much different than our
11 settlement strategy.

12 MR. FINCH: Your Honor, with all due respect there's
13 a case directly on point on this exact issue. The Babcock and
14 Wilcox case. It's 274-Bankruptcy Reporter --

15 THE COURT: Cite it in your motion. I'm not -- I
16 don't have a motion before me. What I'm trying to find out is
17 why you care. Because in your motion -- and I'll deal with it
18 in the Motion to Compel and the response. Because unless you
19 can show me how getting into Grace's settlement discussions is
20 going to lead to evidence that you can admit in this case,
21 which is what I'm having the difficulty understanding, I don't
22 think you're entitled to it. Having said that, the Debtor is
23 not eligible to use it either. The Debtor can't introduce the
24 reasons why it settled a case any more than you can introduce
25 the reasons why the Debtor settled a case.

1 MR. FINCH: Your Honor, in every asbestos,
2 fraudulent transfer or estimation case that I've tried -- and
3 I've tried six of them -- there have been testimony from
4 defense lawyers or claims adjusters who would come in and say,
5 we would settle these cases because they reflected real
6 liability. I --

7 THE COURT: These aren't fraudulent transfers.

8 MR. FINCH: No, in asbestos -- the Armstrong case.
9 We've put on the testimony -- the defense Counsel for Armstrong
10 and the claims settlement for Armstrong.

11 THE COURT: This is not a fraudulent transfer case.

12 MR. FINCH: It's not a fraudulent --

13 THE COURT: It's an asbestos personal injury case.

14 And I don't care what reasons at this point in time you did in
15 some other case and why some Judge let it in --

16 MR. FINCH: It was -- it wasn't --

17 THE COURT: -- including me.

18 MR. FINCH: It wasn't the -- it was the Armstrong
19 confirmation hearing. It wasn't a fraudulent transfer case.

20 THE COURT: Okay.

21 MR. FINCH: It was the exact issue we're trying
22 here, which is what was the overall magnitude of Armstrong's
23 asbestos liability. The same issue was in Owens-Corning. The
24 same issue in Federal Mobil. All those cases say you can get
25 into the settlement history and the settlement history is

1 relevant and admissible for proving the liability of the
2 Debtor.

3 THE COURT: They've all gone into the settlement --
4 the fact that there have been settlements and what those claims
5 where that were settled at what amount. As far as I know, they
6 did not reopen up the settlement negotiations. I've read some
7 of those transcripts, including the Armstrong estimation
8 transcript, and I don't recall a single word there where the
9 parties went into the reasons for pre-petition settlements that
10 someone was objecting to as the basis of the fact that you
11 can't bring it into evidence because it reflected a prior
12 settlement.

13 MR. FINCH: Your Honor, we will address this --

14 MR. BERNICK: Your Honor, can I make a request as a
15 matter of process? Which is that I think this is a great
16 discussion and I'm happy that Mr. Finch raises it. I'm
17 familiar with it. I could respond to all the different
18 elements of it and talk about Babcock. But I think that Your
19 Honor has given a preview of a concern that you have. He's
20 given us a preview of the position they're going to take, which
21 we appreciate. If the question is, will we agree with their
22 view that this doesn't have to be submitted to the mediator
23 first --

24 MR. FINCH: Yes.

25 MR. BERNICK: I would agree with that. I think that

1 this is important enough that it should come before Your Honor
2 in the first instance --

3 THE COURT: Okay, that's fine.

4 MR. BERNICK: -- and therefore they should go file
5 their motion and we'll respond to their motion. I do want to
6 make clear though, because I'm now sitting here listening to
7 the statement again and I hear characterizations of what we've
8 said in Court being characterized as waiver. We have waived
9 nothing. They've raised an issue which is the intent to rely
10 upon the settlements and they said this is why we think it's so
11 important.

12 I've made a bunch of observations about why those
13 settlements don't stand for what they say they stand for but
14 it's their contention that those settlements are relevant.
15 What we say by way of a response to it doesn't mean that we've
16 waived anything. So I -- but to be clear, it is our position
17 we are not waiving our rights under Rule 408 and we will
18 respond to their motion in due course. I'm happy to have it
19 teed up at an early date to get resolved. I think that that's
20 also appropriate.

21 THE COURT: Okay.

22 MR. BERNICK: I'd also say it's also appropriate to
23 take it up perhaps in connection with our Motions to Compel at
24 an early date because if they're going to seek discovery of why
25 we have settled, we're going to seek discovery for why they

1 have settled and why their claims were worth only \$200 for a
2 lung cancer -- why that is so. I mean, it -- the -- there's
3 all these things are connected. And I think that rather than
4 spend more time on it today, I think Mr. Finch has given us a
5 heads up. We're agreeable not to mediate it. We're agreeable
6 to a more expedited schedule. Let's just file the papers and
7 proceed.

8 THE COURT: What I expect to hear from the Debtor is
9 an assertion as to whether or not the Debtor intends to get
10 into the reasons why cases were settled. If you do, I'm going
11 to let them do discovery, because they're entitled to challenge
12 it. If your position is going to be that as a legal matter,
13 the settlements are irrelevant somehow, or shouldn't be
14 considered for whatever reason you raise -- without getting
15 into the merits, then I don't know that there is an entitlement
16 to --

17 MR. BERNICK: Fair enough.

18 THE COURT: -- discovery because neither side can --
19 as I understand it -- do this. So I think --

20 MR. BERNICK: Well, Your Honor, if they --

21 THE COURT: -- you folks should discuss the matter
22 and --

23 MR. BERNICK: Yes.

24 THE COURT: -- see whether or not you can come to an
25 agreement as to what you are and are not going to raise by way

1 of an evidentiary matter with respect to these pre-petition
2 settlements. I agree with you, Mr. Finch. Every other Court
3 that I know of that's looked at this has considered the pre-
4 petition settlements. So the Debtor is going to have to show
5 me if they don't want me to consider them, why they shouldn't.

6 But that is not my understanding of what the Debtor's
7 contention has been. My understanding is we're going through
8 this questionnaire process as to claims that have not yet been
9 paid so that somebody can say the existing universe of claims
10 are valued at these dollars for these reasons. And among them
11 for example, hypothetically, maybe this universe of claims is
12 valued at 0 because there is no evidence of any impairment.
13 You know, that might be something that they allege with the
14 existing, unpaid, unsettled claims.

15 MR. FINCH: But I'm --

16 MR. BERNICK: Again, my point, Your Honor, was a
17 process point which is that we -- and I would dearly love to
18 respond to what Your Honor has said about the other cases. I
19 won't do that. We've spent a lot of time on this today and I
20 think that this is far too important a discussion that is kind
21 of contours of where things are going to be spending time on it
22 now as opposed to in the very systematic fashion --

23 THE COURT: All right.

24 MR. BERNICK: -- when we get to it. And therefore I
25 would respectfully ask the Court to suggest to all the parties

1 that we move onto something else in the status report and maybe
2 conclude so that folks can pursue their other travel
3 arrangements.

4 MR. FINCH: Well, may I suggest that the Court just
5 give us a briefing schedule for this? I mean --

6 MR. BERNICK: Well --

7 THE COURT: Sure, why -- well --

8 MR. BERNICK: -- it really ought to be tied to when
9 we're going to have the brief -- maybe we can do it this way.
10 We would like to ask the Court to have maybe a special setting
11 that would be the same time when we take up the Motion to
12 Compel on the questionnaires, in -- you know, late November,
13 early December. And if they want to file a motion with respect
14 to the discovery of our claim files, we will respond on a basis
15 that we have them both teed up on the same day.

16 THE COURT: Wait. I -- do we have December dates?

17 THE CLERK: Omnibus dates? Or --

18 MR. FINCH: Special -- a special setting date --

19 THE COURT: Special setting.

20 MR. FINCH: -- for the first week of December,
21 possibly.

22 THE CLERK: Well --

23 THE COURT: December 5th?

24 THE CLERK: Do you have that --

25 THE COURT: I don't -- I must have left it in --

1 THE CLERK: December 5th, I think we have --

2 MR. BERNICK: Maybe while she's --

3 THE COURT: Go ahead.

4 MR. BERNICK: I was going to suggest that maybe if
5 there's something else that you all wanted to address as
6 concerns the status report?

7 MR. FINCH: Sure. The -- yeah.

8 MR. BERNICK: Yeah.

9 MR. FINCH: The second item you raised on the status
10 report was about the request for X-rays. I didn't regard the
11 questionnaire as asking people to submit original X-rays. I'm
12 not aware of any law firms being contacted by Grace asking them
13 to submit their original X-rays.

14 As I recall the questionnaire, it said send in your B
15 reader report or your X-ray report or your narrative diagnosis,
16 and then Grace reserves the right to come back and seek the
17 original X-rays. Once you get into trying to obtain original
18 X-rays, there's all kinds of custody problems and you know,
19 people have these X-rays out in a hospital, they maybe need the
20 X-rays to use in a case that they're going to trial in. They
21 can't just turn them over to Grace willy-nilly for you know,
22 however long Grace decides to --

23 MR. BERNICK: We had this specific discussion, Your
24 Honor in connection with the questionnaire because we were
25 concerned about getting discovery from the law firms. Your

1 Honor said, "No, you can get medical material from the doctors
2 and please attach all X-ray readings and reports you may -- but
3 are not required to attach." The Court however has ruled that
4 Grace may seek access to chest X-rays upon request. So that
5 was specifically preserved for us. Not that the issue was
6 preserved.

7 MR. FINCH: I understand.

8 MR. BERNICK: But that we are going to be able to
9 get access, we have now made the requests by letter --

10 MR. FINCH: Okay.

11 MR. BERNICK: -- to all --

12 MR. FINCH: That explains why I haven't seen it.

13 MR. BERNICK: -- firms -- yes.

14 MR. FINCH: Could you please copy me with the
15 letters?

16 MS. HARDING: He will copy me. It just went out
17 over the weekend I think.

18 MR. FINCH: Okay. Then, suffice it to say, Your
19 Honor, the law firms and/or the Asbestos Claimants Committee
20 may well have issues with the -- what Grace wants to do with
21 the X-rays. And you know, you may have to resolve that through
22 either a --

23 THE COURT: Well, obviously if somebody needs them
24 in a hospital and can't give it up, and a copy can't be made,
25 then the Debtor is going to have to, you know, be given access

1 to them where they can be located. But can't X-rays be copied?

2 MR. FINCH: They're relatively expensive to copy an
3 X-ray. I mean, it's \$100, \$200 process that --

4 THE COURT: Well, if the Debtor wants them and wants
5 them badly enough, then we'll have to figure out working out
6 some kind of cost if that's the case.

7 MR. BERNICK: Well, we -- it is the only way that we
8 have to go back through this process and establish to the Court
9 what the standard read would have been. So it's --

10 THE COURT: You're only asking for this for the
11 doctors -- in {quotes} "Judge Jack doctors," is that the case?

12 MR. BERNICK: Let me defer to Ms. Harding, who is
13 much more familiar with this than I, to specify.

14 THE COURT: All right.

15 MS. HARDING: Your Honor, in the letter, we've
16 requested for diagnosing doctors or treating doctors, copies of
17 X-rays. Obviously they -- we don't want to take their original
18 X-rays. For B reading doctors or doctors that are not their
19 treating or diagnosing doctors, we've asked for originals.

20 MR. FINCH: All I can say is, Your Honor, the -- you
21 may well be getting objections to such requests and/or, you
22 know, Motions for Protective Order from people to -- relating
23 to the handling and care and treatment of those X-rays. I
24 just --

25 THE COURT: Yes, I --

1 MR. FINCH: -- flag it as an issue.

2 THE COURT: I think that is going to be a problem
3 that we'll have -- we may have to address. But hopefully if
4 the Debtor is going to send them to, you know, people who are
5 familiar with reading X-rays and that's the point of having the
6 X-rays, those people will be aware of the need to handle the X-
7 rays appropriately and not cause damage. And I assume that
8 they can be given back at a certain point in time.

9 MR. BERNICK: Absolutely, and remember, we focused
10 on a narrow population to begin with. And with respect to --

11 THE COURT: Well, okay. With respect to that narrow
12 population, to the extent that you're getting information from
13 actual diagnosing doctors, not the Judge Jack doctors, do you
14 really need the X-rays?

15 MR. BERNICK: Yes, because the X-rays are what the B
16 readers for the lawyers will rely upon to say -- you know, lot
17 of people smoke, lot of people get lung cancer. Is this lung
18 cancer a result of asbestos exposure?

19 THE COURT: Oh, I see.

20 MR. BERNICK: So the X-ray is not for purposes of
21 questioning the diagnosis of lung cancer. It is to determine
22 whether the lung cancer is asbestos-related. So it has to be
23 read for that purpose. And remember, these again, are all
24 claims for people who had claims pending against Grace as of
25 now five years ago.

1 So you know, these are -- this is not necessarily
2 something that is in immediate use right now. We've also
3 focused it on lung cancer and other cancers -- not mesothelioma
4 and not at this point the non-malignants, although we will get
5 to that perhaps on a sampling basis. So we've tried to be very
6 conservative about it.

7 If it has to be litigated like everything else here, I
8 suppose it has to be litigated but this again, Your Honor, is
9 something that we did litigate and specifically addressed the
10 question --

11 THE COURT: No, and I think you're entitled to see
12 them to the extent that I really was focused in that paragraph
13 more I think on the B reader types of problems as opposed to
14 the diagnosing physicians. But to the extent that you're
15 looking for something that's five years old, if you're -- if
16 that's what you're looking for, the initial X-ray reads, I
17 suppose there may not be quite so much of a problem. But if
18 somebody was diagnosed five years ago with lung cancer and is -
19 - there may be so many --

20 MR. BERNICK: We are happy to do -- make the -- to
21 be cooperative in the arrangements that are necessary to get
22 access and obviously somebody who was diagnosed five years ago
23 could well still have current records. So we're prepared to do
24 -- that's why we --

25 THE COURT: Or may be deceased and there may be no

1 need for current records.

2 MR. BERNICK: Or there may be no need for current
3 records. So the point is, we got the request out there. If
4 people come in and say, Your Honor, it shouldn't have happened
5 at all, then we're really not making much progress. If people
6 want to come in to us and say how can we make arrangements so
7 that this is as -- you know, as convenient or less inconvenient
8 as possible, that's a dialogue we can make a lot of progress
9 on.

10 What I'm worried about is that we're going to now spend
11 another 30 days litigating the question of whether this process
12 should take place at all. And Your Honor, our view is and our
13 consistent position has been this has been gone over, Your
14 Honor has made this determination and people ought now to be
15 talking to us about how to get it done.

16 THE COURT: Well, the Debtor can reach out to people
17 too, to try to get it done.

18 MR. BERNICK: We're trying to.

19 THE COURT: Okay. Well, I think I've already
20 determined that you can make this request to the extent that
21 your B readers or doctors -- whoever -- excuse me -- you're
22 going to use need access to the X-rays, that's one thing. To
23 the extent that the X-rays are five years old, I have some
24 doubts except for the fact that people may need them to compare
25 changes. But if they're for lung cancers, the likelihood is --

1 MR. FINCH: Yeah, well --

2 THE COURT: -- that --

3 MR. FINCH: -- Your Honor, most of the lung cancer
4 claimants who were diagnosed more than five years ago are dead.

5 THE COURT: That's --

6 MR. FINCH: Or 95% of them. But it doesn't mean
7 they've been able to get their -- that the Estate has been able
8 to get their case to a trial yet. The docket in some places
9 may well be five years long or more. So there will -- there
10 could possibly be some situations where people have X-rays who
11 they need to go, you know, use in a trial somewhere even though
12 the person whose X-ray it is, is dead.

13 THE COURT: Well --

14 MR. FINCH: But all I'm saying is I'm flagging the
15 issue that there may well be --

16 THE COURT: Okay.

17 MR. FINCH: Either motions practice or an issue
18 related to this.

19 THE COURT: That's fine. I mean, to the extent that
20 they're alleging that Grace's asbestos caused the problem, they
21 have to prove the claim in this case, so they're going to have
22 to produce the X-rays in this case. This is the Federal Court,
23 unless it's a District Court where they're trying a case and
24 therefore, I don't get the supremacy clause in my favor --

25 MR. FINCH: Your --

1 THE COURT: They produce them here first and we
2 worry about the State Courts later.

3 MR. FINCH: Your --

4 THE COURT: That's my ruling, Mr. Finch.

5 MR. FINCH: Your Honor, though, but the -- nobody's
6 claim is getting allowed or disallowed, I thought, in this
7 case?

8 THE COURT: Mr. Finch, it's for estimation purposes.
9 They need to produce that proof. Let's just get past it.
10 Okay. But, yes, you need to work with the Debtor.

11 MR. ESSERMAN: Your Honor, this is Sandy Esserman.
12 Can I make a couple quick statements?

13 THE COURT: Yes, sir.

14 MR. ESSERMAN: As to the X-rays, hopefully those
15 will get worked out. I'm not familiar and have not heard from
16 any of the firms that I represent as to whether or not X-rays
17 have been requested but it would seem to me it would certainly
18 go a long way, since the reproduction of an X-ray can be
19 expensive, if Grace would offer to pay for any copies that
20 would be made because I suspect that people would be very
21 reluctant to let loose the only X-ray they have, especially
22 when the client may be either ill, inform or deceased and that
23 could be a problem. Just sort of previewing that issue.

24 The next thing I just wanted to preview was on the
25 extension. I have heard from many law firms and to a certain

1 extent but very limited, I do agree with Mr. Bernick in this
2 sense -- that is, it makes no sense to give, say, a 60-day
3 objection, only to get to the end of the 60 days and say, oh,
4 by the way, I object to everything that you're seeking and I'm
5 not going to give you any additional information. That -- Mr.
6 Bernick is correct in that, that doesn't make any sense.

7 What I'm hearing from the firms that I represent that have
8 large numbers of clients is that it -- they will need an
9 additional 60 days to provide information. There may be some
10 additional objections -- or not additional. There may be some
11 objections that need to be addressed before that time, but for
12 the information that they are providing in the questionnaires
13 that is going back and giving information in the
14 questionnaires, when that time is requested, it's my
15 understanding -- and it would only come from me that that would
16 -- that time would be necessary to complete the questionnaires,
17 objections aside.

18 And it may be that we have to address objections sometime
19 during the next 30, 45 days or so. But the parties will still
20 need that additional time to complete the supplementation of
21 their questionnaires.

22 THE COURT: Okay.

23 MR. ESSERMAN: Just wanted to make sure that was
24 clear.

25 THE COURT: All right, Mr. Esserman. Well, the only

1 day I have -- in fact, I have a half a day between now and the
2 December Omnibus that would fit in with the Debtor filing
3 objections after November 12th is Tuesday, December the 12th at
4 -- I -- we could start at -- was that Virgin Islands early?

5 THE CLERK: In November the 12th?

6 THE COURT: No, you've got December 5th. I'm sorry.
7 Did I say December 12th? I apologize. December 5th. I'm
8 looking at the wrong day in the calendar. Tuesday, December
9 5th. That was the Virgin Island hearing date?

10 THE CLERK: Something was on --

11 THE COURT: Morning. I think we could start at 1
12 o'clock. So I could give you --

13 MR. FINCH: So this would be --

14 THE COURT: -- the afternoon.

15 MR. FINCH: -- a hearing both on the Motions to
16 Compel and the questionnaire and then on the Committee FCR
17 Motion to Compel the production of Grace's lawyers' files?

18 MR. BERNICK: Wait a minute. I'm sorry, lawyers'
19 files?

20 MR. FINCH: Well, the -- specifically it's the
21 Motion to Compel response to document request 47 and 66, which
22 are related to Grace's settled claims. Reasons for settlement.

23 MR. BERNICK: Is that right? Yeah, we don't have a
24 problem with that.

25 MR. FINCH: No, we don't have a problem with --

1 MR. BERNICK: But if that's going to be the case, it
2 -- well, first of all, I guess the question is whether Your
3 Honor, that would be all right to schedule those two matters on
4 that day?

5 THE COURT: Yes, that's fine. You'll have from 1
6 o'clock until we --

7 MR. FINCH: Finish.

8 THE COURT: -- we finish.

9 MR. BERNICK: Then I would go back to Mr. Esserman
10 and Mr. Finch as well and say if those matters are going to be
11 heard on the 5th of December, we're going to file -- we would
12 like to file a motion that tees up the issues on the
13 questionnaires and if we're going to do it on that timetable
14 basis, and it's going to be, both sides get what they want in
15 terms of timing, we need to be able to have people who are
16 prepared to tell us that they're actually going to be objecting
17 and we don't have to wait to go sift through thousands of
18 questionnaires on November the 12th. That's just not fair.
19 So, you know, Mr. Esserman represents -- I don't know how many
20 -- 10 firms?

21 MR. ESSERMAN: Yes.

22 MR. BERNICK: Yeah. So, let's have -- let us have
23 then -- your clients be prepared within the next week to tell
24 us what objections they're going to be standing on, so we can
25 file a motion. You all can respond and will be heard on the

1 5th of December.

2 MR. ESSERMAN: We can certainly try to get as much
3 of that information --

4 MR. BERNICK: Well, but --

5 MR. ESSERMAN: -- as to what objections that these
6 firms are still insisting to you during this time frame.

7 MR. BERNICK: I appreciate that. I mean, Your
8 Honor, our point obviously is that we're prepared to be
9 cooperative. Mr. Finch has got a matter that he would like to
10 raise on a timely basis. We've got a matter that we would like
11 to raise on a timely basis. We're prepared to do the
12 scheduling but we need -- we do need folks like Mr. Esserman
13 and his clients not to simply be waiting 'til the 12th of
14 November to tell us what it is that they're going be objecting
15 to.

16 If they would give us, you know, what their big objections
17 are within a week, we will move to compel and we can proceed.
18 We don't want to sit here and then up on December the 5th with
19 a bunch of people saying oh, well, gee, you know, it's not
20 timely and it's got to shift over to December -- to January --
21 only then to go forward on the motions that they haven't even
22 filed that relate to us. It's just not appropriate.

23 THE COURT: Well, you obviously need to know what
24 some of the objections are going to be or you can't very well
25 file a Motion to Compel. So --

1 MR. BERNICK: Right.

2 THE COURT: -- you know --

3 MR. BERNICK: We can file the Motion to Compel
4 tomorrow and then wait 'til the 12th and then kind of go
5 sifting through and finding out who it's going to apply to and
6 try to deal with it. It's just kind of silly. We just ought
7 to have, with respect to some of these major firms who have
8 thousands of claims, what their position is. It's just not
9 that hard.

10 MR. ESSERMAN: Yeah, I think we will endeavor to try
11 and get that information to Mr. Bernick, Your Honor, as to what
12 issues may be outstanding so we can try and tee things up on
13 December 5th. Once again, notwithstanding that, the major
14 firms will need -- I've been informed, 60 days to complete the
15 questionnaires regardless. If -- I think maybe at that day we
16 can perhaps tee up some of the issues that Mr. Finch raised
17 about X-rays also. Although this is the first I've heard of
18 that.

19 MR. BERNICK: I'd like to propose we take this one
20 step at a time. If we're in agreement that we're going to have
21 December the 5th as Motions to Compel with respect to document
22 request 47 and 60 --

23 MR. FINCH: 66.

24 MR. BERNICK: -- 60 -- I'm sorry?

25 MR. FINCH: 6 -- I think. I'm doing this off of

1 memory.

2 MR. BERNICK: Well, whatever it is --

3 MR. FINCH: But I think it's 47 and 66.

4 MR. BERNICK: -- that you mentioned before is fine.

5 But we're going to have Motion to Compel and the
6 questionnaires, I think that we can probably work out a
7 schedule -- Mr. Finch, Mr. Esserman and I -- or Ms. Harding,
8 that deals with the briefing on that so that you get those
9 briefs in a timely fashion. With respect to the -- Mr.
10 Esserman's request that his clients be given by the Court at
11 this time a 60-day extension even on the matters that are not
12 subject to the objection, we would very vociferously disagree
13 with that. There has been eons of time to do that and I think
14 it's not appropriate, Your Honor said last time it ought to be
15 done in 30 days. 30 days is coming up. This is the very
16 reason why there should be a dialogue. We're prepared to reach
17 agreements with these people and --

18 THE COURT: Well, that's what I think I ordered.

19 MR. BERNICK: Yeah.

20 THE COURT: What I said is it should be done in 30
21 days but I recognized at the same time that there were firms
22 who had a huge client base that it would probably take more
23 than 30 days to answer these questionnaires and I --

24 MR. ESSERMAN: And that's what I'm referring to.

25 MR. BERNICK: Well, that is what we ought to be

1 talking about instead of asking the Court to grant a two-month
2 extension that will just --

3 MR. ESSERMAN: I'm not asking the Court to grant a
4 two-month extension right now to anything. I'm informing the
5 Court as part of the status conference as to where things are
6 so people can understand that the law firms are out there
7 working on these questionnaires. Initial feedback is that
8 they're -- that the major firms with lots of questionnaires to
9 respond to are going to need 60 days to complete those
10 questionnaires. It's a status conference.

11 THE COURT: Mr. Esserman, can -- are -- as the firms
12 get the questionnaires done, are they submitting them to the
13 Debtor piecemeal rather than holding them all at one -- to one
14 time?

15 MR. ESSERMAN: I have no idea, Your Honor.

16 THE COURT: Okay. Is there a way that we can get
17 that done so that as the questionnaires come in, that it can be
18 a sliding scale? Because I think part of the --

19 MR. ESSERMAN: I think that's a good idea.

20 THE COURT: I think part of the problem is the fact
21 that the Debtor isn't getting batches of information at a time.
22 And when you get everything at one time, it's too hard to
23 process. So if we can get the questionnaires submitted to the
24 Debtor as they're completed, then I think at least the Debtor
25 will be able to start amassing whatever information it wants to

1 get from those questionnaires and the time frame may not be so
2 onerous, you know, if the Debtor is waiting for 15% of the
3 questionnaires for 60 days rather than 100%, that may be
4 workable. But if you're waiting for 100% it's not workable,
5 so --

6 MR. BERNICK: They usually --

7 MR. ESSERMAN: No, I agree, Your Honor.

8 MR. BERNICK: -- come in at the last day.

9 MR. ESSERMAN: That makes perfectly logical sense.

10 THE COURT: Okay. So how do I communicate an order
11 then to get the questionnaires to the Debtor as they're
12 completed -- including the objections. I mean, if what the --
13 if what they're -- if what the entities are going to say is
14 that they object and they're not going to complete questions X,
15 Y and Z, and everything else is finished, then that ought to be
16 submitted to the Debtor now. There's no need to wait.

17 MR. BERNICK: Yeah. It seems to me that maybe if we
18 can call upon recognizing that as has been said repeatedly,
19 that the Asbestos Claimants Committee does not actually
20 represent the claimants individually, certainly we could ask
21 that Counsel for the Committee simply circulate a letter
22 reflecting what Your Honor has said to the different law firms.
23 That's the best way to get it done and get it done soon.

24 MR. FINCH: What, that the -- that questionnaires be
25 sent in -- I'm not sure what I mean by --

1 MR. BERNICK: That we don't wait -- that all the
2 questionnaires don't come in on the date that they're due.
3 Instead we get the questionnaires on a steady basis --

4 THE COURT: You -- I --

5 MR. FINCH: I don't have any --

6 MR. ESSERMAN: If the firms --

7 MR. FINCH: -- ability to know how -- I mean --

8 MR. BERNICK: Well, you don't have to --

9 MR. FINCH: All I could do is send a letter saying
10 we would suggest to you that you send the questionnaires in
11 when you complete batches of them as opposed to waiting and
12 holding all of them at the -- when it's the same time.

13 THE COURT: No, I think the thing to do is to say
14 that, you know, at the end of every business day, every
15 questionnaire that's completed should be mailed to the Debtor
16 that day, including if, you know, if they're going to be
17 objected to, then that fact -- the fact that they're not going
18 to answer and that they're objected to should be sent to the
19 Debtor.

20 Everybody's going to want to make use of this information
21 at some point. So let's just get it in and get the information
22 done. If the firms can't complete the questionnaire, then they
23 won't be sent in at that time. But if they're finished, they
24 ought to be sent in. There's no point to hiding this
25 information at this point. It's going to become -- come into

1 the Debtor anyway. Let's get it done. So --

2 MR. BERNICK: With respect to the -- I mean, seems
3 to me another solution is simply I could suggest that -- may
4 want to write a letter that just says what -- attach the
5 transcript, here's what the Court said.

6 THE COURT: Why don't you give me an order and I'll
7 sign an order that tells people as they get the questionnaires
8 done at the end of every business day they're to mail them to
9 the Debtor. If it takes an order, honestly, I can't imagine
10 that -- I've just never seen a process like this. I can't
11 imagine that it takes a Court Order to have somebody send in a
12 questionnaire that they're going to answer anyway earlier
13 rather than later when it's done.

14 MR. ESSERMAN: I don't think it does take a Court
15 Order, Your Honor. I think a communication from the Committee
16 and -- would be sufficient as to what the Court wants -- that
17 is as the questionnaires are done, they're to be turned in on a
18 rolling basis.

19 THE COURT: Yes, that's really all it takes. I
20 don't understand why the Committee can't prepare that type of
21 letter and reflect this Court's ruling. But if you can't
22 then --

23 MR. FINCH: No, I can prepare that letter, Your
24 Honor. Unless you're just saying I can't prepare that letter.
25 I just can't guarantee that every single day people will be

1 stuffing envelopes. All I can do is tell people to comply with
2 the Court's Orders and send the materials in on a rolling
3 basis. I don't --

4 THE COURT: That's fine.

5 MR. FINCH: -- know whether some firms might hold --
6 you know, wait until they get enough to put in a box and --

7 MR. ESSERMAN: I think that'll be -- that should be
8 sufficient.

9 THE COURT: That's fine.

10 MR. BERNICK: With respect to the X-rays, if I can
11 suggest to Mr. Esserman, who is effective in this area as in
12 all things, that again on behalf of his clients if we could
13 have a dialogue -- we're prepared to do it as soon as possible
14 -- about the best way to get access to these X-rays without
15 causing inconvenience. I'm sure whatever it is that we could
16 reach agreement on with Mr. Esserman would be eminently
17 satisfactory to all others concerned. But we're prepared to
18 have that discussion right away so that we don't wait for, you
19 know, a special setting or special hearing to hash it out.

20 THE COURT: All right, did --

21 MR. ESSERMAN: And that's fine, David. I would like
22 to know who have you requested X-rays and how many X-rays --

23 MR. BERNICK: Yeah.

24 MR. ESSERMAN: -- per law firm.

25 MR. BERNICK: We'll get you --

1 MR. ESSERMAN: That would be helpful.

2 MR. BERNICK: We will get that information to you.

3 MR. ESSERMAN: Okay, thank you.

4 MR. FINCH: I mean, it may be that what ends up
5 happening is you put up -- have like an X-ray repository where
6 you gather the X-rays in some place and then they can send
7 their B readers there and look at the X-rays and --

8 MR. BERNICK: And we're not -- no, no, no --

9 THE COURT: That probably -- that may make sense.

10 MR. FINCH: That is all --

11 MR. BERNICK: Well, if the B readers have got to be
12 -- the way that the B readers do their reading is they have
13 other jobs and they have other activities and they need to have
14 access to them so they're not camping out in some facility
15 waiting for the X-rays to show up.

16 THE COURT: That may make some sense, Mr. Finch.
17 You can talk to Mr. Esserman about how to get this done.

18 MR. FINCH: I mean, I have been involved in personal
19 injury litigation before where you -- there's been a central
20 medical record repository for multiple claimants. And rather
21 than shipping, you know --

22 MR. BERNICK: We've got a central shipping point. I
23 guess the point is not where they're shipped to.

24 THE COURT: Well, I think the handling --

25 MR. BERNICK: It's where they're reviewed.

1 MR. FINCH: No, it's the handling.

2 THE COURT: Yes, the handling.

3 MR. FINCH: It's the handling and the review --

4 THE COURT: The handling and the -- yes.

5 MR. FINCH: -- and the doctors come to where the
6 records are.

7 THE COURT: The handling and the review's the issue.
8 I'm certain that you'll be able to work this out. If a central
9 repository makes sense, do it that way. If you have to send
10 your B readers there, then tell them to take three days off and
11 go read X-rays for three days.

12 MR. BERNICK: Yeah, well, and then the question will
13 be -- and we're prepared to talk about this on any kind of
14 basis that makes sense -- we need the date when the X-rays are
15 going to be there. And it's got to be fairly soon for this
16 process to work. We can't have it coming in dribs and drabs
17 and we can't --

18 THE COURT: Well, when does your letter ask?

19 MR. BERNICK: -- have it be all -- what? 30 days.

20 UNIDENTIFIED SPEAKER: Within 30 days.

21 THE COURT: Okay, so talk to Mr. Esserman about how
22 to do it, and Mr. Finch too.

23 MR. BERNICK: Your Honor, I don't know -- did you
24 have anything else that you wanted to raise?

25 MR. FINCH: I don't have anything else. I believe

1 Counsel for the Futures rep has brief comments and remarks.

2 And I'm --

3 THE COURT: All right.

4 MR. FINCH: -- on the same train that you are, so --

5 MR. BERNICK: Okay. We're all on the 5:15 train.

6 THE COURT: I wouldn't plan on that if I were you
7 folks. Go ahead.

8 MR. MULLADY: Good afternoon, Your Honor.

9 THE COURT: Good afternoon.

10 MR. MULLADY: Ray Mullady for the Future Claimants
11 Representative. This is my first occasion to address the Court
12 and I appreciate the opportunity, even if it comes at 4:45 and
13 people are trying to make trains. I will be brief.

14 But I do want to briefly address the FCR's view of the
15 status of things. And where we think this questionnaire
16 process and indeed the entire estimation methodology that's
17 being advanced by the Debtors is taking us, because it's our
18 view, and I believe Mr. Finch shares this view as well, that
19 it's taking us to a place where ultimately this is not going to
20 be a very helpful process for the Court.

21 And I want to just point out a few of the things that we
22 are seeing. It's appropriate, I think to point these things
23 out to the Court as early indications of where we think we're
24 going.

25 MR. BERNICK: Your Honor, as a process point again.

1 The agenda calls for a status report with respect to the
2 personal injury claims -- the asbestos PI claims. It does not
3 call for a report on the current observations of current
4 Counsel for the FCR and where the --

5 THE COURT: Mr. Bernick, I have given the Debtor
6 every leeway. Please sit down and let me get through this.
7 You want to make your train, I'd like to get off the Bench.
8 Mr. Mullady, please proceed.

9 MR. MULLADY: Thank you, Your Honor. All right,
10 Your Honor, I think we've seen at this point that the Debtor's
11 approach is as I said taking us to a place where estimation for
12 plan confirmation purposes is not going to be very helpful.
13 And why is this so?

14 Well, there are two principal problems as we see them.
15 Mr. Bernick -- and I've read the prior transcripts -- he likes
16 to talk about elephants in the room. There are two mastodons
17 that are staring us down in terms of this questionnaire process
18 and what the Debtors have advanced here.

19 The first is a -- is just the cumbersome nature and the
20 glacial pace of this process. I don't need to belabor this
21 point. The Court made the observation at the last hearing that
22 this has been a tortuous path, one that the Court may not
23 repeat again.

24 But let's just look at the time line here briefly. It is
25 October the 23rd. Estimation reports are due on December the

1 1st, a little over a month from now. Your October 12th Order
2 on Grace's Motion to Compel requires that supplementation of
3 the questionnaires be provided by November the 12th. Three
4 days later we're going to have -- we have the bar date. And
5 we're going to have Proof of Claim forms streaming in on those.
6 Presumably within a week or two after that, Grace will once
7 again update the Russ database. Several law firms have
8 indicated that they're going to be doing supplementations. Mr.
9 Bernick said that he has no idea what those supplementations
10 are going to be. A lot of uncertainty there.

11 Ultimately this is going to be worked in, we assume, to
12 yet another draft of the Russ database. Our experts have
13 already been provided several of these draft iterations of the
14 Russ database. We wonder if we will ever get a final version.
15 And how much time should our experts have to play around with
16 draft versions of this database before we get the final one?

17 THE COURT: Well, you can't get it until the Debtor
18 has it.

19 MR. MULLADY: I understand that, Your Honor.

20 THE COURT: So --

21 MR. MULLADY: It's -- again, it's just our
22 observation that the way this process is working is we are
23 going to be in the position of having to provide estimation
24 reports, having not received even a remotely close to a final
25 version of the Russ database until almost the eve of when our

1 reports are due and that's a tremendous concern for us.

2 The second problem, Your Honor, and certainly not second
3 in terms of its seriousness or priority, is just the inherent
4 limitation of this questionnaire process in its ability to be
5 predictive about what would happen to Grace and its claims and
6 ability to resolve claims outside the bankruptcy. That is,
7 after all, the purpose of this estimation proceeding. But what
8 are we seeing?

9 Let's just look at a couple examples of where this process
10 does or does not provide complete information. Mr. Bernick
11 said in Court on September 11 and then again on September the
12 26th that Waters and Kraus, which filed questionnaires on
13 behalf of about 400 people, identified only one mesothelioma
14 claimant. And the rest did not have any recognized disease, is
15 what he said. Well, Russ database shows the same thing -- one
16 mesothelioma.

17 In fact, though, of the Waters and Kraus claimants, our
18 information is 116 have had -- have or have had mesothelioma
19 and another 150 are lung cancer claimants. Now, anyone could
20 have told this or made this determination within about five
21 minutes by looking at the attachments to the questionnaires.
22 But under Russ protocol, if the box isn't checked, the disease
23 diagnosis isn't made and it's as if the disease isn't there.

24 Now, we don't think this is a defensible position for
25 Grace to take. And we suspect that sooner or later, Russ is

1 going to figure out that the Waters and Kraus claimants have
2 mesothelioma or lung cancers. But it's an indication, at least
3 at this point, that the iterations of the Russ database that we
4 are getting are worthless.

5 There's another issue and I can just point to the Court as
6 just another example. There's a firm, Whites & Luxembourg, had
7 a processing deal with Grace. There are some 12 to 15,000
8 Whites & Luxembourg clients that are not subject to the Bar
9 Order, because they don't have settled claims under the Bar
10 Order. And they don't have non-settled claims under the Bar
11 Order. Now, for the FCR's purposes, we know these claims are
12 there. We know they're future claims. And they'll have to be
13 evaluated and certainly our experts will take those into
14 account.

15 But it's again another piece of information -- and not an
16 insubstantial one that is not captured within the information
17 that this questionnaire is purporting to provide.

18 THE COURT: I thought the only group of claimants
19 excused from the Bar Date Order were the settled claims?

20 MR. BERNICK: That's correct. Or -- from the Bar
21 Date Order --

22 MR. MULLADY: Well --

23 MR. BERNICK: -- the settled claims --

24 THE COURT: Yes.

25 MR. BERNICK: -- have to submit a Proof of Claim --

1 THE COURT: Different claim.

2 MR. BERNICK: -- for settled claim --

3 THE COURT: Yes.

4 MR. BERNICK: -- by the bar date. So they already
5 had to proceed.

6 THE COURT: So why aren't the Whites & Luxembourg
7 claims in?

8 MR. BERNICK: They should be.

9 MR. MULLADY: No, Your Honor --

10 MR. ESSERMAN: They're not.

11 MR. FINCH: These are people who haven't -- who
12 never presented a claim to Grace pre-petition. They didn't sue
13 Grace pre-petition --

14 THE COURT: Oh.

15 MR. MULLADY: -- because they had a processing deal.

16 MR. FINCH: -- they had a processing deal.

17 THE COURT: Oh, so they're future claims.

18 MR. FINCH: They had -- they're future claims.

19 MR. MULLADY: They're futures.

20 MR. FINCH: But they're future claims that --

21 MR. BERNICK: Well, that's fine.

22 MR. FINCH: -- you know they exist.

23 THE COURT: All right.

24 MR. FINCH: It's 12 to 15,000 claimants. It's just
25 that the questionnaire's not going to pick them up.

1 THE COURT: Well, they're not going to be in the
2 Russ database, if they're future claims and the Russ database
3 is supposed to cover present claims.

4 MR. FINCH: No, they won't be in the Russ.

5 THE COURT: Right.

6 MR. ESSERMAN: Your Honor -- just to clarify this.
7 Basically the only people that submitted Proofs of Claim are
8 those people who'd sued Grace in the tort system.

9 THE COURT: Right, that's --

10 MR. ESSERMAN: -- pre-petition. If you didn't sue
11 Grace pre-petition but had a claim, you had to file a Proof of
12 Claim.

13 THE COURT: Right. That's what the bar date --
14 that's what the Debtor asked for for the bar date --

15 MR. ESSERMAN: Correct.

16 THE COURT: -- so that it had a finite date as to
17 which to determine for its estimation purposes the universe.

18 MR. ESSERMAN: Yes.

19 THE COURT: Yes. So those claims won't be in the
20 Russ database.

21 MR. MULLADY: It's a minor point, Your Honor.
22 They're future claimants. We know about them. Again, just
23 another example of what's not captured in the questionnaire.
24 And another point, Your Honor, is that, you know, the
25 perception is coming through pretty clearly to us that the

1 Debtor's view is that these questionnaire responses, when fully
2 provided and vetted by their experts, that that response is
3 really the trial-ready claim of that individual claimant. And
4 this is the case that we would be defending in Court.

5 These are the data points on which we would have defenses.
6 We'd be able to respond to this. They're nothing but --
7 nothing of the sort, Your Honor. These are not trial-ready
8 claims. We -- I'm putting up for the Court to -- see if we can
9 get this focused in.

10 THE COURT: I'm not going to be able to read that
11 because of the highlighting. So you'll have to read it to me.

12 MR. MULLADY: I'd be happy to, Your Honor. We are
13 serving -- we have served some requests for admissions to Grace
14 to have them concede what we think are some fairly unassailable
15 propositions about what these personal injury questionnaires
16 cover and what they don't.

17 And we've asked, in responding to the Grace asbestos
18 personal injury questionnaire, have asked them to admit that an
19 individual asbestos personal injury claimant was not required
20 to identify all factual testimony, expert witness testimony or
21 other evidence that he or she might seek to introduce into
22 evidence in a trial against Grace involving his or her
23 individual personal injury claim.

24 Obviously, the questionnaire doesn't go there. Nor does
25 it ask the claimant or require him to gather information that

1 was not yet available, obviously. Nor does the questionnaire
2 require a claimant to identify all expert witnesses who may be
3 called to testify on his or her behalf in a trial against
4 Grace. And finally, it doesn't -- the questionnaire doesn't
5 require any claimant to identify all fact witnesses who may be
6 called upon to testify on his or her behalf in a trial against
7 Grace.

8 So at the end of the day, you know, we're going through
9 this process. It's very cumbersome. It's very time-consuming.
10 It has pushed the dates out quite far. And what we're going to
11 have in our view -- the sum total of this is a microscopically
12 small glimpse at a very small number of claims that Grace will
13 take and extrapolate into a sum total of what it believes its
14 exposure is -- it's artificial. We will have a lot more to say
15 about this in terms of Daubert motions practice and otherwise
16 but these are the concerns that the FCR has at this time.

17 THE COURT: Well, I think the FCR hasn't exactly
18 expressed those concerns in that format, but the -- I mean,
19 that is, I think what the positions of the parties on the other
20 side -- from Grace -- have been contending all along -- that
21 Grace wants to do this trial one way and they want to do it
22 another. And I finally couldn't get anybody to agree, so I
23 said, fine, Grace'll do it its way. You do it your way. And
24 I'll decide who wins and who loses. So okay?

25 MR. MULLADY: And there we are.

1 THE COURT: Okay.

2 MR. MULLADY: Thank you, Your Honor.

3 THE COURT: There we are.

4 MR. BERNICK: Just as a factual matter, Your Honor,
5 the Waters and Kraus citation was interesting because our point
6 about Waters and Kraus is you took a look at the questionnaire,
7 you couldn't tell anything -- he hasn't filled anything out.
8 Now apparently they went back or somebody went back and did
9 what Waters and Kraus should have done, which is go back to
10 their own medical records and tell us in the box what the
11 disease being claimed was.

12 They hadn't done it. Waters and Kraus hadn't done it.
13 And Your Honor then ordered them in that hearing that Counsel's
14 talking about to check the box. And when he talks about the
15 fact that the box wasn't checked that was the very problem
16 that's now been cured because Your Honor has ordered them to
17 check the box and then I'm sure Russ will pick it up. So I
18 don't know what the point of that was.

19 With respect to Mr. -- the Whites and Luxembourg's
20 processing deal, we're very familiar with that deal. That's
21 been alleged in other cases. It's not been found to be upheld
22 in other cases. In any event it's an irrelevance because the
23 sample is what the sample is. Presumably, if there's a history
24 of some kind of processing deal, that'll be something that can
25 be incorporated into the analysis. All the requests for

1 admission about trial-ready claims, I think Your Honor --
2 actually these are overstatements about what the facts actually
3 are.

4 But I think Your Honor has well recognized that this is
5 something that will be litigated as the case proceeds. I
6 really believe that if the Futures Representative in this case
7 could provide a process here or assistance to help us get the
8 data that we need -- Your Honor has said we're going to get the
9 data. So if the Futures Representative could figure out ways
10 to help us get the data so that we can make the process less
11 cumbersome, that'd be terrific.

12 But I understand that their position is that they're going
13 to stand by the current claimants in the case. And we'll have
14 to then also pursue -- whether that's what this futures
15 representative has done in all cases, because there's an
16 inconsistency with respect how Mr. Austern has regarded non-
17 malignant kinds in particular, depending upon what case he's
18 in. But that's for another day.

19 THE COURT: Okay. That part is so far off the
20 beaten path for this subject and I'm just striking the last
21 comment from the record. I don't want any responses to it.
22 I'm just striking it. Now, with respect to the Futures Claims
23 Representative position, I don't think you're asking me for
24 anything. I'm just simply hearing your report. Okay. Does
25 anybody else have any reports that you wish to make? Is that

1 the end of the agenda? Okay. So we're on for December the 5th
2 at 1 o'clock in Pittsburgh?

3 MS. HARDING: Yes, Your Honor.

4 MR. BERNICK: Thank you, Your Honor.

5 THE COURT: All right, and then the Omnibus is
6 November 20. Okay. Thank you. We're adjourned.

7 ALL: Thank you, Your Honor.

8 (Court adjourned)

9

10 CERTIFICATION
11 I certify that the foregoing is a correct transcript from the
12 electronic sound recording of the proceedings in the above-
13 entitled matter.
14

15 *Lewis Parham*

11/2/06

16 _____
17 Signature of Transcriber

Date